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### The Structural Constitutional Principle of Republican Legitimacy

Mark D. Rosen

*IIT Chicago-Kent College of Law*, [mrosen1@kentlaw.iit.edu](mailto:mrosen1@kentlaw.iit.edu)

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# The Structural Constitutional Principle of Republican Legitimacy

Name Removed\*

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*"We are in the business of rigging elections."*  
North Carolina state senator<sup>2</sup>

*"We are going to shove [the district map] up your fu\*cking ass and you are going to like it, and I'll fu\*ck any Republican I can."*  
Democratic chairman regarding the new districting plan for  
Democratic-led county board in Illinois<sup>3</sup>

*"[W]e are going to draw the lines so that Republicans will be in oblivion in the state of New York for the next 20 years."*  
Malcolm Smith, New York State Senate president<sup>4</sup>

*"It is fair to infer that partisan considerations may have played a significant role in the decision to enact" Indiana's voter identification law.*  
Crawford v. Marion County Election Board, 128 S.Ct. 1610, 1624  
(2008) (Stevens, J., plural. op).

*"Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a \$100,000 donation does not alter the way one thinks about — and quite possibly votes on — an issue? . . ."*  
Alan Simpson, former United States Senator<sup>5</sup>

*"Even a cursory survey of world events over the last 20 — or 100 — years makes plain that democracies are fragile, that democratic institutions can be undermined from within. Ours are no exception."*  
Alexander Keyssar<sup>6</sup>

## I. INTRODUCTION

Representative democracy does not spontaneously occur by citizens gathering to choose laws. Instead, republicanism takes place within an extensive legal framework that determines who gets to vote, how campaigns are conducted, what conditions must be met for representatives to make valid law, and many other things. Many of these "rules-of-the-road" that operationalize representative democracy have been subject to constitutional challenges in recent decades. For example, lawsuits have been brought against "partisan gerrymandering," which has contributed to most congressional districts not being party-competitive, but instead being safely

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<sup>2</sup> See Hoefel, Six Incumbents Are a Week Away from Easy Election, Winston-Salem Journal, Jan. 27, 1998, p. B1, quoted in Vieth v. Jubelirer, 541 U.S. 267, 317 (2004) (Kennedy, J., concurring).

<sup>3</sup> JONATHAN WINBURN, THE REALITIES OF REDISTRICTING 1 (Lexington Books 2008).

<sup>4</sup> "He Probably Didn't Mean To," THE NEW YORK TIMES, page A28, May 6, 2010.

<sup>5</sup> McConnell et al. v. Federal Election Commission, 540 U.S. 93, 149 (2003).

<sup>6</sup> "The Strange Career of Voter Suppression," THE NEW YORK TIMES, page A19, February 13, 2012.

Republican or Democratic,<sup>7</sup> and against onerous voter identification requirements that reduce the voting rates of certain voting populations.<sup>8</sup>

These constitutional challenges were based on individual rights claims that were grounded in Equal Protection or Free Speech. This Article's principle argument is that the rules-of-the-road of representative democracy also implicate a structural constitutional principle, wholly independent of individual rights based claims, that to date has gone unnoticed: "Republican Legitimacy."<sup>9</sup> The Article explains Republican Legitimacy's source and content, the costs of failing to recognize it, and the payoffs of doing so.

Republican Legitimacy's derivation is relatively straightforward. The Constitution establishes a federal government that essentially is a representative democracy, *i.e.*, a republican form of government. The Constitution also guarantees a republican form of government to the states. The Constitution's establishment and guarantee of republicanism across the federal and state governments encompass the necessary preconditions for these republican forms of government to successfully and legitimately operate. These preconditions are the contents of the constitutional principle of Republican Legitimacy.

Republican Legitimacy's absence has led to egregious conduct by legislatures and distorted judicial analyses. As to legislatures, look again at the shocking statements collected in the prologue:<sup>10</sup> legislators acknowledging that they "are in the business of rigging elections,"<sup>11</sup> that "we are going to draw the lines so that Republicans will be in oblivion in the state of New York for the next 20 years,"<sup>12</sup> and that campaign "donations . . . alter the way one thinks about – and quite possibly votes on – an issue . . ."<sup>13</sup> The harm is not just to individuals, but to republican government itself.

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<sup>7</sup> See *Vieth v. Jubelirer*, 541 U.S. 267 (2004); see Sam Hirsch, *The United States House of Unrepresentatives: What Went Wrong in the Latest Round of Congressional Redistricting*, 3 ELECTION L. J. 179 (2003) (providing exhaustive analysis of gerrymandering of congressional districts); Nathaniel Persily, *In Defense of Foxes Guarding Henhouses: The Case for Judicial Acquiescence to Incumbent-Protecting Gerrymanders*, 116 HARV. L. REV. 649, 663-64 (2002) (noting that most congressional districts are safely democratic or republican); but see Rhodes Cook, *Congressional Redistricting: Is Creating "Safe" Districts a Dying Art?*, <http://www.centerforpolitics.org/crystalball/articles/frc2011033101> (March 31, 2011) (concluding that "safe congressional seats will always be with us, but probably not as many as their most ambitious creators would want").

<sup>8</sup> *Crawford v. Merion County Election Board*, 553 U.S. 181 (2008).

<sup>9</sup> The closest anyone else has come is Professor Teachout, who has proposed that the Constitution contains an "anti-corruption" principle. See Zephyr Teachout, *The Anti-Corruption Principle*, 94 Cornell L. Rev. 341 (2009). Part II.C.3 explains why Republican Legitimacy is doctrinally and conceptually superior to "anti-corruption."

<sup>10</sup> See *supra* text and notes 2 - 8.

<sup>11</sup> See *supra* note 2.

<sup>12</sup> See *supra* note 4.

<sup>13</sup> *McConnell*, 540 U.S. at 149 (quoting former U.S. Senator Alan Simpson).

More generally, inattentiveness to Republican Legitimacy has led legislators to think that democracy's rules-of-the-road are a part of ordinary politics. Republican Legitimacy makes clear that politicians have a special duty to act with a higher order of care when choosing the rules-of-the-road: they must act in accordance with "tempered" rather than "hardball" politics. As skeptical as one may be of politicians, there is no reason to assume legislators would not take seriously their oaths to uphold the Constitution once they understood it included Republican Legitimacy. Furthermore, there are steps that courts and Congress can take to encourage state legislatures -- the institutions presumptively responsible for most of the rules-of-the-road under the Constitution<sup>14</sup> -- to act consistently with "tempered politics."

As to courts, the individual rights doctrines they have invoked have left vulnerable the structural interests of Republican Legitimacy. Republican Legitimacy identifies legally significant facts that are overlooked by rights doctrines that focus primarily on individuals, provides conceptual traction that rights-based doctrines do not, and makes clear why various sub-doctrines developed in the individual-rights context that limit judicial review have no rightful application in respect of a structural principle like Republican Legitimacy.

This Article's argument unfolds in five parts. Part II explains the doctrinal source of Republican Legitimacy, as well as its contents. Like the constitutional principles of separation of powers and federalism, Republican Legitimacy is a structural principle that protects and effectuates the republican institutions that are created and guaranteed by the Constitution. Republican Legitimacy secures the conditions that must pertain for decisions of the people's representatives to legitimately bind the people. Drawing primarily on political theory, Part II explains that Republican Legitimacy has two components: (1) the mechanisms for determining who will be the representatives in a republican form of government and (2) the decision-making processes that the representatives use in generating the laws that are to bind the polity. Part II then anticipates several possible objections, and explains why Republican Legitimacy is conceptually and doctrinally superior to the "anti-corruption" principle that is found in some case law and has been discussed by some scholars.<sup>15</sup>

Part III then considers to what extent Republican Legitimacy is already present in the Court's jurisprudence. It first shows that many Supreme Court decisions have recognized the significance of the two components of Republican Legitimacy. Most of these decisions, however, have folded these considerations into the individual-rights doctrines of equal protection and free speech. Part III explains why it is critical that Republican Legitimacy be recognized as a structural constitutional principle that is independent of the individual rights-based doctrines of equal protection and free speech.

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<sup>14</sup> See U.S. CONST. ART. I, §4, cl. 1.

<sup>15</sup> See *supra* note 9.

Part IV demonstrates Republican Legitimacy's explanatory power by applying it to three recent Supreme Court decisions. Republican Legitimacy illuminates troublesome features of Indiana's strict voter identification law that were not treated as legally significant under Justice Stevens' plurality opinion in *Crawford v. v. Merion County Election Board*,<sup>16</sup> and explains why a successful challenge would not require a showing of discriminatory intent, *pace* Justice Scalia's concurring opinion. Part IV then uses Republican Legitimacy to critique the *Vieth v. Jubelirer*<sup>17</sup> decision, which essentially declared political gerrymandering to be non-justiciable.<sup>18</sup> Republican Legitimacy identifies heretofore unrecognized common ground shared by Justice Kennedy's concurrence and the four *Vieth* dissenters that conceivably could have led to a different result in the case.

Part IV then applies Republican Legitimacy to the Court's divisive decision of *Citizens United v. Federal Election Commission*,<sup>19</sup> which invoked the First Amendment to strike down the Bipartisan Campaign Reform Act's prohibition against the use of corporate and union general treasury funds for independent expenditures.<sup>20</sup> Republican Legitimacy clarifies the nature and significance of the governmental interest behind the Act's expenditures prohibition. Republican Legitimacy provides a more elegant and compelling frame for understanding the welter of policies discussed in Justice Stevens' dissent under the rubrics of "anti-corruption" and "anti-distortion," and Republican Legitimacy's constitutional status explain why these policies satisfy the compelling governmental interest requirement. Independent of this, Part IV also shows that deciding whether corporate and union expenditures should be banned implicated a conflict between competing constitutional principles -- free speech and Republican Legitimacy -- and argues that Congress' considered resolution of such a constitutional conflict should have been entitled to substantial deference by the Court.

Part V provides a conclusion that also serves as a prologue to a companion article that considers what roles different governmental and societal institutions must play if Republican legitimacy is to be appropriately guarded.<sup>21</sup> Courts have a vital role to play, as this Article shows, but so do the legislatures themselves.

## II. TEXTUAL AND CONCEPTUAL DERIVATION OF REPUBLICAN LEGITIMACY

This Part II explains the derivation and contents of Republican Legitimacy. It proceeds in three steps. Part II.A. explains from where in the

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<sup>16</sup> 553 U.S. 181 (2008).

<sup>17</sup> 541 U.S. 267 (2004).

<sup>18</sup> Justice Kennedy's concurrence, which provided the crucial fifth vote, left only a small window open for political gerrymandering claims. *See infra* Part IV.B.

<sup>19</sup> 130 S. Ct. 876 (2010).

<sup>20</sup> *See id.* at 887.

<sup>21</sup> *See* Mark D. Rosen, *Implementing Republican Legitimacy: Courts and Tempered Politics* (manuscript).

Constitution Republican Legitimacy is derived. Part II.B explains Republican Legitimacy's contents. Part II.C anticipates and responds to three arguments that may be leveled against the claim that Republican Legitimacy is an independent structural constitutional principle.

#### A. *Republican Legitimacy's Doctrinal Derivation*

Republican Legitimacy is a structural constitutional principle that derives from five constitutional provisions that together establish that the federal and state governments are essentially republican in character insofar as governmental power is exercised by representatives who ultimately are answerable to citizens.<sup>22</sup> The first provision is Article I's charge that the House of Representatives "shall be composed of Members chosen . . . by the People."<sup>23</sup> The second is the Seventeenth Amendment's instruction that the Senate be composed of Senators "elected by the people . . ."<sup>24</sup> The third are the constitutional provisions, as supplemented by custom, that establish that the president is essentially popularly elected.<sup>25</sup> Fourth, the republican character of all these popularly elected institutions is confirmed, and has been deepened, by the Amendments that have expanded the franchise, namely the Fifteenth (race, color, or previous condition of servitude), Nineteenth (women), Twenty-fourth (proscribing poll taxes), and Twenty-Sixth Amendments (age). Fifth, and finally, the Guarantee Clause provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government . . ."<sup>26</sup>

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<sup>22</sup>To be sure, many different concepts of "republican" can be located among Americans during the Founding era. See AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 276-81 (demonstrating that many in the Framers's generation treated democracy and republican interchangeably); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787* 48-90, 593-618 (describing the evolution of the meaning of "republicanism" between the Revolution and 1787). I draw upon Madison's understanding of republicanism in Federalist 10, see THE FEDERALIST NO. 10, at 81-84 (J. Madison) (Rossiter ed), which has become the accepted definition today, see AMAR, *supra* at 276.

<sup>23</sup> U.S. Const. Art. I, §2, cl. 2.

<sup>24</sup> U.S. Const., Amend. 17.

<sup>25</sup>Although Article II only provides that the President shall be elected by "Electors" appointed by the state legislatures, it long has been understood that the federal government is a "government whose essential character is republican, whose executive head and legislative body are both elective . . ." Ex parte Yarbrough, 110 U.S. 651, 657 (1884). The Twenty-third Amendment strengthens the President's republican character by guaranteeing that the people residing in the District of Columbia can participate in his election.

<sup>26</sup> U.S. Const. Art. IV, § 4. My claim that the Guarantee Clause is the source of a constitutional principle binding states and the federal government is unaffected by the Clause's having been held to be a nonjusticiable political question, See *Baker v. Carr*, 369 U.S. 186, 218-20 (1962), because non-justiciable constitutional questions are still binding, even if they are not judicially enforceable. See *Vieth*, 541 U.S. at 292. Further, the Court has held that the Guarantee Clause is enforceable by Congress, see *Baker*, 369 U.S. at 220, and my proposal places primary responsible



Republican Legitimacy's derivation from the above provisions is straightforward: The Constitution's establishment and guarantee of republican forms of government include the minimum powers and limitations that are necessary to protect and effectuate these republican institutions. These powers and limitations are themselves of constitutional dimension, and they constitute the structural constitutional principle of Republican Legitimacy.<sup>27</sup>

The Supreme Court has recognized other non-explicit, structural constitutional principles on the ground that they are necessary to preserve or effectuate institutions created by, or recognized by, the Constitution. Most of these structural principles function as limitations on expressly granted constitutional powers, but some principles have been the source of affirmative governmental powers.

The two best known structural principles that operate as constitutional limitations are separation-of-powers and federalism. In *Morrison v. Olson*,<sup>28</sup> for example, the Court held that Congress can restrict the President's power to remove executive officials only insofar as it "does not interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed.'"<sup>29</sup> What was necessary to preserve the President's explicitly created constitutional powers thus constituted an implied constitutional limitation on Congress' powers. Similarly, the Court in *New York v. U.S.*<sup>30</sup> held that Congress could not "commandeer" state legislatures, notwithstanding the absence of an express constitutional provision barring Congress from doing so, because such an anti-commandeering rule was necessary to "protect the sovereignty of states."<sup>31</sup> Republican Legitimacy is similarly derived: it is a constitutional principle that consists of what is necessary to preserve the representative democracy that our Constitution creates (vis-à-vis the federal government) and guarantees (vis-à-vis the states).

Separation of powers and federalism are not the only examples of

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for enforcing Republican Legitimacy with Congress. See Rosen, *Implementing Republican Legitimacy*, *supra* note 21.

<sup>27</sup> Jack Balkin has similarly spoken of "democratic self governance" as a structural principle. See Jack M. Balkin, *Commerce*, 109 MICH. L. REV. 1, 7 (2010).

<sup>28</sup> 487 U.S. 654 (1988).

<sup>29</sup> *Id.* at 689-90; see also *id.* at 690 (holding that the Ethics in Government Act "taken as a whole" does not "violate[] the principle of separation of powers by unduly interfering with the role of the Executive Branch.").

<sup>30</sup> 505 U.S. 144 (1992).

<sup>31</sup> *Id.* at 181; see also *id.* at 177 (in "determining whether the Tenth Amendment limits the ability of Congress to subject state governments to generally applicable laws, the Court has in some cases stated that it will evaluate the strength of federal interests in light of the degree to which such laws would prevent the State from functioning as a sovereign; that is, the extent to which such generally applicable laws would impede a state government's responsibility to represent and be accountable to the citizens of the State.").

implied constitutional limitations that protect constitutionally created institutions. Consider the case of *U.S. Term Limits, Inc. v. Thornton*,<sup>32</sup> where the Court held unconstitutional an Arkansas law establishing term limits for congressmen from that state. No provision of the Constitution explicitly forbade states from imposing term limits. The Court nonetheless found an implied constitutional limitation, justifying it *inter alia* on the ground that it was necessary to protect the constitutionally-created institution of the House of Representatives: “The Constitution thus creates a uniform national body representing the interests of a single people. Permitting individual States to formulate diverse qualifications for their representatives would result in a patchwork of state qualifications, undermining the uniformity and the national character that the Framers envisioned and sought to ensure.”<sup>33</sup>

The Court also has found implied constitutional *powers* on the ground that they were necessary to effectuate constitutionally-created institutions. Consider first the constitutional executive privilege. The Court held in *United States v. Nixon* that although “[n]owhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”<sup>34</sup> The Court’s conclusion that the executive privilege is a constitutional power rested on pragmatic reasoning. “The privilege is fundamental to the operation of Government because [a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately.”<sup>35</sup> There must be “candid, objective and even blunt or harsh opinions in Presidential decisionmaking.”<sup>36</sup>

The Court also has found that Congress has implied constitutional powers. Although the Constitution does not expressly grant Congress the power to investigate, the Court held in *McGrain v. Daugherty*<sup>37</sup> that Congress has constitutional investigative powers because such powers are a prerequisite to effective legislation. Congress “possesses not only such powers as are expressly granted to them by the Constitution, but such auxiliary powers as are necessary and appropriate to make the express powers effective.”<sup>38</sup> In determining what “auxiliary” powers were necessary to “make the express powers effective,” the Court once again utilized pragmatic reasoning. “A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information -- which not infrequently is true -- recourse must be had to others who do possess it. Experience has taught that mere

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<sup>32</sup> 514 U.S. 779 (1995).

<sup>33</sup> *Id.* at 822.

<sup>34</sup> 418 U.S. 683, 711 (1974).

<sup>35</sup> *Id.* at 708.

<sup>36</sup> *Id.*

<sup>37</sup> 273 U.S. 135 (1927).

<sup>38</sup> *Id.* at 173.

requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed.”<sup>39</sup>

In short, separation-of-powers and federalism jurisprudence, as well as the *Thornton*, *Nixon*, and *McGrain* decisions, all reasoned that powers and limitations that were necessary to protect or effectuate expressly-created or recognized constitutional institutions were themselves of constitutional status. Republican Legitimacy is derivable on the same basis: the Constitution expressly establishes a republican federal government and guarantees that the states similarly will have republican governments, and these constitutional institutions and guarantees include the minimum conditions that are necessary to protect and effectuate these republican forms of government.

\*\*\*\*\*

That the Court has found implied constitutional powers (and limits) in other contexts does not, on its own, mean that it should do so *here*. The Article’s next parts explain why Republican Legitimacy is another appropriate constitutional inference. Part II.B draws on political theory to explain why there must be a principle such as Republican Legitimacy if republican institutions are to be well functioning and stable. This analysis permits the construction of a framework that fleshes out Republican Legitimacy’s concrete contents. Parts III.A and III.B show that many of the components of Republican Legitimacy already have been recognized in case law.

Parts II.B and III.A-III.B are mutually reinforcing. Parts III.A-III.B provide a doctrinal basis for Part II.B’s theoretical discussion. Further, Part III serves as inductive support for Part II.B’s theoretical reasoning.<sup>40</sup> In the other direction, Part II.B’s analytical framework offers critical insights into the Court’s jurisprudence. It makes clear that case law that until now has been thought to address disparate subjects (such as limitations on the franchise, term limits, and campaign finance) actually are part of a single whole: they are aspects of the jurisprudence of Republican Legitimacy.

Part II.B’s framework also identifies two shortcomings in the case law. First, some matters that the Court has treated as “compelling interests” are actually part Republican Legitimacy, and hence are of independent

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<sup>39</sup> *Id.* at 175. The Court also noted that congressional investigate powers had a long historical pedigree. *See id.* But the Court used the longstanding historical practice as confirmation of the legislature’s pragmatic need of such a power, not as a prerequisite to finding the constitutional power. *See id.* (“All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.”)

<sup>40</sup> *See infra* note 210.

constitutional status. Second, some matters that the Court has treated under the rubric of individual rights instead are aspects of the *structural* constitutional principle of Republican Legitimacy. Part III.C explains why it is important that Republican Legitimacy be understood as an independent constitutional principle that is structural rather than rights-based.

### B. *Republican Legitimacy's Content*

The contents of Republican Legitimacy are best identified by asking the following question: what conditions must be met for decisions of the peoples' representatives to legitimately bind the people?<sup>41</sup> A governmental system that cannot provide an adequate answer to this question cannot be both free and stable.<sup>42</sup> Jeremy Waldron sets up the issues nicely:

We imagine a decision being made by a certain process and we imagine a citizen  $C_n$ — who is to be bound or burdened by the decision — disagreeing with the decision and asking why she should accept, comply, or put up with it. Some of those who support the decision may try to persuade  $C_n$  that it is right in its substance. But they may fail, not because of any obtuseness on her part, but simply because  $C_n$  continues (not unreasonably) to hold a different view on this vexed and serious matter. What then is to be said to  $C_n$ ? A plausible answer may be offered to her concerning the process by which the decision was reached. Even though she disagrees with the outcome, she may be able to accept that it was arrived at fairly. The theory of such a process-based response is the theory of political legitimacy.<sup>43</sup>

Waldron helpfully concludes that there are two components to a theory of political legitimacy. First, there must be an appropriate mechanism for selecting which individuals will make the community's political decisions (*i.e.*, who will be the representatives in a republican form of government). I shall call this the "Legitimate-Selection" component. Second, the representatives must themselves utilize an acceptable decision-procedure when creating laws.<sup>44</sup> Call this component "Legitimate-Decisionmaking." In short, Legitimate-Selection addresses the integrity of *electoral* results, whereas Legitimate-Decisionmaking concerns *legislative* results.<sup>45</sup>

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<sup>41</sup> Cf. JOHN RAWLS, THE LAW OF PEOPLES 24 (defining a "reasonably just (though not necessarily a fully just) constitutional democratic government" as a "government [that] is effectively under th[e people's] political and electoral control . . .").

<sup>42</sup> See generally JOHN RAWLS, POLITICAL LIBERALISM 35 (describing the requirement of a "well-ordered society" in which "citizens have a normally effective sense of justice and so they generally comply with society's basic institutions, which they regard as just").

<sup>43</sup> See Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L. J. 1346, 1387 (2006).

<sup>44</sup> See *id.*

<sup>45</sup> Sanford Levinson uses a similar two-part framework. See SANFORD LEVINSON, OUR UNDEMOCRATIC CONSTITUTION 27.

## 1. Legitimate-Selection

The constitutional principle of Republican Legitimacy comprises the minimum requirements of the two aforementioned components. The Legitimate-Selection component encompasses what Waldron helpfully calls “the theory of fair elections to the legislature, elections in which people like  $C_n$  were treated equally along with all their fellow citizens in determining who should be privileged to be among the small number participating” in the law-making that will bind  $C_n$  and all other citizens.<sup>46</sup> *Pace* Waldron’s formulation, though, there is not a *single* “theory of fair elections,” but instead are multiple legitimate contenders. For example, strong arguments can be made on behalf of both majoritarian and proportional electoral systems.<sup>47</sup>

Reasonably controversial aspects of fair elections are not part of the *constitutional* requirement of Republican Legitimacy (though they may well be included in Waldron’s first component of political democracy). Instead, Republican Legitimacy comprises matters about which there can be no reasonable disagreement – matters that are veritable *sine qua nons* of a republican system, such as the requirement of competitive elections for important governmental officials. For example, a political system where citizens vote only for or against a single candidate for their country’s chief executive – as in the former Soviet Union and Saddam Hussein’s Iraq – categorically fall outside the scope of a republican form of government. Encompassed within Legitimate-Selection are such matters as who has the franchise, how votes are cast (which in turn includes voter registration and the mechanics of voting), and how votes are aggregated (*i.e.*, whether districts are used and, if so, how they are drawn). I will have much more to say about Legitimate-Selection in Part IV.

## 2. Legitimate-Decisionmaking

The contents of the second component of Republican Legitimacy – Legitimate-Decisionmaking – are difficult to specify. For example, while majority rule might be thought to be part of the second component, there are strong reasons to resist this conclusion.<sup>48</sup> Probably the most important

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<sup>46</sup> *Id.* at 1387.

<sup>47</sup> For a useful discussion, *see* CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES (Arend Lijphart & Bernard Grofman eds. 1984).

<sup>48</sup> Waldron provides a brief but spirited defense of the principle of majority decision, *see* Waldron, *supra* note 43, at 1388, but his claim that majority decisionmaking is necessary to political legitimacy is doubtful. Majority rule in fact is normatively controversial. *See* AMARTYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE 161-63 (1970); VERMEULE, *supra* note 49, at 7; John O. McGinnis & Michael B. Rappaport, *Majority and Supermajority Rules: Three Views of the Capitol*, 85 TEX. L. REV. 1115 (2007). Further, some aspects of the Constitution (such as the Treaty Clause) explicitly demand a supermajority, and it has been persuasively argued that our Constitution’s bicameralism and presentment requirements effectively operate as a supermajority requirement. *See id.*

aspect of Legitimate-Decisionmaking derives from the fact that virtually all theories of democracy incorporate a requirement that, when government acts, it act for the purpose of promoting the “public good, somehow defined” and, conversely, that “self-interested behavior by government officials” is illegitimate.<sup>49</sup>

Indeed, “public good” requirements are a central component of the theories of many of the most important political theorists, past and present. A central concern of Western political theory has been to explain why the state can justifiably compel individuals against their will, and the limits of that power.<sup>50</sup> “Public good” requirements have played a central role in answering these crucial questions.<sup>51</sup>

According to John Locke, for example, the legislature has power to enact laws only because “the public has chosen and appointed” the legislature.<sup>52</sup> This consent is the *sine qua non* of law’s legitimacy for Locke: what is “absolutely necessary to . . . a law” is that the law have emanated from a body that has “the consent of the society, over whom nobody can have a power to make laws, but by their own consent and by authority received from them.”<sup>53</sup> Legislative power accordingly can extend only to the powers that the legislature has been granted by the people. And this principle determines the outer limit of legislative power: because “nobody can transfer to another more power than he has in himself,” the legislature can have no more power than “those persons had in a state of nature before they entered into society and gave up to the community.”<sup>54</sup> Locke understands man’s powers under the law of nature to extend only to “the

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<sup>49</sup> Cf. ADRIAN VERMEULE, *MECHANISMS OF DEMOCRACY: INSTITUTIONAL DESIGN* WRIT SMALL 4-5 (2007); see also *id.* at 34 (“Disagreement about the uniquely best definition of impartiality need not prove an embarrassment to the limited ambitions of real-world democratic design, which are fully satisfied by identifying a set of decisions that all competing definitions of impartiality condemn.”).

<sup>50</sup> See, e.g., RAWLS, *supra* note 42, at 217 and back cover (“[w]e ask: when may citizens by their vote properly exercise their coercive political power over one another when fundamental questions are at stake?”); JOHN STUART MILL, *ON LIBERTY* 59 (the “subject of this essay is . . . the nature and limits of the power which can be legitimately exercised by society over the individual,” which for Mill includes both state power and non-legal customs); GERALD GAUS, *THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD* 2 (“The question that has occupied liberal political theory – whether free and equal persons can endorse a common political order even though their private judgments about the good and justice are so often opposed – is the fundamental problem of a free moral order”).

<sup>51</sup> Indeed, public good requirements can be traced back to Aristotle and Aquinas. See Eduardo M. Penalver & Lior Strahilevitz, *Judicial Takings or Due Process?*, CORNELL L. REV. at n. 50 (forthcoming 2012).

<sup>52</sup> JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT*, chapter XI, ¶134.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at ¶135.

preservation of himself and the rest of mankind,” and so Locke accordingly concludes that the legislature’s “power, in the utmost bounds of it, *is limited to the public good of the society*,”<sup>55</sup> which he defines as the preservation of himself and mankind. Locke consistently contrasts pursuit of the “public good” with the illegitimate exercise of “power for [a ruler’s] private ends of their own”<sup>56</sup> and with a ruler’s “distinct and separate interest from the good of the community . . .”<sup>57</sup>

Public good requirements are also central to Rousseau. Rousseau thought the state’s legitimate powers extend only to “authentic act[s] of the general will,” meaning “the common good” or “the common interest.”<sup>58</sup> For Rousseau, the “general will” consists only of those desires of an individual that are shared by all other citizens in his polity.<sup>59</sup> For this reason, when the state identifies and enforces the general will, it does not compel a citizen against his will. To the contrary, limiting state power to the general will assures that the citizen need “obey nobody but [his] own will.”<sup>60</sup> It follows that when lawmakers legislate, they must aim to advance only the common good, and that they cannot act parochially “towards any particular and circumscribed object . . .”<sup>61</sup> This is yet another “public good” requirement.

While contemporary political theorists largely reject Lock’s assumption of actual consent<sup>62</sup> and Rousseau’s assumption that laws constitute the overlap of citizens’ wills,<sup>63</sup> most theorists continue to embrace “public good” requirements.<sup>64</sup> John Rawls, for example, states that “[o]ur

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<sup>55</sup> *Id.* (emphasis supplied). Locke also argues that the executive’s “prerogative” power gives him the power to “act according to discretion for the public good, without the prescription of the law and sometimes even against it . . .” *Id.* at ¶160. But the executive’s prerogative power, like the legislature’s power, is limited to that which is for the “public good.” *Id.*; *see also id.* at ¶163.

<sup>56</sup> *Id.* at ¶162.

<sup>57</sup> *Id.* at ¶163.

<sup>58</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT*, Book 2, chapter 4, at 76-7 (Maurice Cranston Trans.)

<sup>59</sup> *See* DAVID M. ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* 103 (explaining Rousseau’s ‘general will’ as being “whatever is common to the will of all citizens”).

<sup>60</sup> *See id.* at 77.

<sup>61</sup> *Id.* at 75.

<sup>62</sup> For example, though Rawls falls within the contractarian tradition, his approach does not rest on citizens’ actual consent, but instead aims to describe by means of the original position what political structure reasonable persons *hypothetically* would consent to. *See* generally, C.A. Stark, *Hypothetical Consent and Justification*, 97 *JOURNAL OF PHILOSOPHY* 313, 313 & n. 1 (2000). For the unusual example of a modern theorist who retains the requirement of actual consent, *see* RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* 11-31 (2004).

<sup>63</sup> *See*, e.g., Jeremy Waldron.

<sup>64</sup> Notable exceptions are the public choice theorists, who posit that politics is a forum, no different from the marketplace, where people aim to advance their

exercise of political power is proper only when we sincerely believe that the reasons we would offer for our political actions – were we to state them as government officials – are sufficient, and we also reasonably think that other citizens might also reasonably accept those reasons.”<sup>65</sup> He dubs this the “criterion of reciprocity,” and concludes that such reciprocity is a requirement of “political legitimacy.”<sup>66</sup> Furthermore (and in apparent contradistinction to the stricter notion of Rawlsian “public reason”), the criterion of reciprocity applies to “particular statutes and laws enacted.”<sup>67</sup> Self-interested “naked preferences”<sup>68</sup> cannot satisfy the criterion of reciprocity, which accordingly operates as a “public good” requirement.

A public good requirement also features in the powerful work of Brown University philosopher David Estlund. Estlund aims to explain the legitimacy of democratic decisionmaking processes without relying on citizens’ consent (since most citizens have not given their actual consent to those processes or to the authority of the government).<sup>69</sup> His answer is that it is not sufficient that the democratic procedure be “fair” – for if that *were* sufficient, then we should be willing to “flip a coin” to make political decisions insofar as coin-flipping is perfectly random and hence fair – something that no one is willing to do.<sup>70</sup> Estlund concludes that beyond being fair, democratic procedures must have “some epistemic value,” that is to say they must have “a tendency to make correct decisions.”<sup>71</sup>

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individual interests. I discuss these theorists below.

<sup>65</sup> JOHN RAWLS, *THE LAW OF PEOPLES*, WITH “THE IDEA OF PUBLIC REASON REVISITED” 137 (1999).

<sup>66</sup> See also *id.* at 149 (writing of “the idea of legitimacy and public reason’s role in determining legitimate law”).

<sup>67</sup> See *id.* Public reason, by contrast, “applies” only to “fundamental political questions,” which Rawls tells us comprises “constitutional essentials and matters of basic justice.” *Id.* at 133. Somewhat confusingly, however, Rawls elsewhere states that public reason “has five different aspects,” one of which is the application of a “family of reasonable political conceptions of justice . . . in discussions of coercive norms to be enacted in the form of legitimate law for a democratic people.” *Id.* Rawls also states that public reason limits the types of reasons that properly can be drawn upon when “exercise[ing] final political and coercive power over one another in enacting laws and in amending their constitution.” Rawls, *supra* note 50, at 214. In short, sometimes Rawls seems to suggest that public reason’s constraints *do* apply to ordinary lawmaking. No more need be said about the scope of public reason for present purposes because the less-strict “criterion of reciprocity” applies to ordinary legislation and constitutes a “public good” requirement, as discussed above in text.

<sup>68</sup> See Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

<sup>69</sup> See Estlund, *supra* note 59, at 3, 9.

<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Id.* at 8. Crucially, the procedures’ epistemic value also must be “publicly recognizable,” that it is to say, the procedure’s tendency to generate correct decisions must be “generally acceptable [to citizens] in the way that political legitimacy requires.” *Id.*



Estlund generates an illuminating, involved argument that people would be morally obligated to consent to a democratic procedure with these characteristics, and that actual consent accordingly is unnecessary just as moral obligations are binding without consent.<sup>72</sup> The notion of “epistemic proceduralism” – that democratic lawmaking must utilize procedures that have a tendency to make correct decisions -- thus stands at the center of Estlund’s claims. Though he does not go into the details of institutional design,<sup>73</sup> his theory implies the existence of some sort of “public good” requirement because democracy’s epistemic requirement cannot be satisfied if law-makers are permitted to pursue self-serving goals when acting in their official capacities.<sup>74</sup>

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Legitimate-Decisionmaking’s “public good” requirement means that certain motivations behind governmental action are illegitimate. Accordingly, the second component of Republican Legitimacy invites serious inquiry into the type of motivations and reasons that legislators properly may rely upon – and those that they *cannot* -- when they legislate. This will receive further consideration later in this Article.<sup>75</sup>

### C. *Anticipating three arguments against Republican Legitimacy*

Three arguments may be asserted against the claim above that Republican Legitimacy is a constitutional principle. First, against the claim concerning Legitimate-Decisionmaking’s “public good” requirement regarding legislators, it might be argued that regardless of what political theorists past and present may have thought, any such requirement is inconsistent with the Madisonian system that was adopted in *our* Constitution. Second, it might be argued that the many well known deficits in democracy that were present during the Founding era – best illustrated by the exclusion of women, African-Americans, and non-property holding whites from voting – undermine the claim that there is a constitutional principle of Legitimate-Selection. Third, it might be argued that what I call Republican Legitimacy is already (and better) addressed by what some cases and commentators have called “anti-corruption.” I develop, and refute, each of these arguments below.

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<sup>72</sup> See *id.* at 10, 117-35.

<sup>73</sup> *Id.* at 2.

<sup>74</sup> Indeed, Estlund alludes to such a conclusion at one of the few places in his book where he briefly considers his theory’s concrete institutional implications. See *id.* at 20 (sharing his “impression[]” that “if points of view get their influence on public conclusions by virtue of the wealth they have at their disposal, public reasoning will be seriously distorted unless this irrational element of power can somehow be countervailed in creative political practice”).

<sup>75</sup> See *infra* Part IV.C.1(b).

1. The Argument against Legitimate-Decisionmaking:  
Madison and ‘Our Constitution’

It might be argued that regardless of what the niceties of political theory might suggest, *our* Constitution’s Madisonian compromise is inconsistent with the claim that Legitimate-Decisionmaking is a constitutional principle. In the Federalist Papers, Madison famously wrote that men are not “angels”<sup>76</sup> and that the Constitution accordingly relies on the principles that “[a]mbition must be made to counteract ambition” and that “the private interest of every individual may be a sentinel over the public rights.”<sup>77</sup> Quoting this, Professor Adrian Vermeuel has argued that Madison believed that “suppressing self-interest at its source is infeasible,” and that Madison instead chose to “leav[e] self-interested motives in place while constricting the opportunities available to self-interested decisionmakers” and to thereby “control[] the effects rather than the causes of self-interest.”<sup>78</sup> Similarly, it has been argued that Madison’s ideas are a foundation for, if not a precursor of, public choice theory,<sup>79</sup> which posits that politics is a forum where individuals simply ought to pursue their individual interests.<sup>80</sup>

Any such Madisonian critique of public good requirements is unavailing for several reasons. First, it relies on a partial reading – if not a misreading -- of Madison.<sup>81</sup> Madison’s discussion of “ambition counteract[ing] ambition” occurs in the context of his explanation of how “the necessary partition of power among the several department as laid down in the Constitution” are to be “maintain[ed].”<sup>82</sup> Madison thus was discussing how the powers of the federal government’s three branches were to be kept distinct. Madison’s solution was to “giv[e] to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>83</sup> So Madison’s discussion of “personal motives” is not a license for legislator’s to pursue their *individual* preferences when legislating, but instead refers to the powers and motivations for members of each branch to guard against (what Madison deemed to be) problematic encroachments from the other branches.<sup>84</sup>

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<sup>76</sup> See THE FEDERALIST NO. 51, at 322 (J. Madison) (Rossiter ed.) (“If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary.”).

<sup>77</sup> *Id.* at 322.

<sup>78</sup> VERMUELE, *supra* note 49, at 36.

<sup>79</sup> See DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION.

<sup>80</sup> See, e.g., THE FEDERALIST PAPERS AND THE NEW INSTITUTIONALISM (B. Grofman & D. Wittman, eds. 1989).

<sup>81</sup> For a similar argument, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 38-45 (1985).

<sup>82</sup> THE FEDERALIST No. 51, at 320.

<sup>83</sup> *Id.* at 321-22.

<sup>84</sup> For a critical discussion of Madison’s view that each department’s powers were to be kept distinct, see Mark D. Rosen, *From Exclusivity to Concurrence*, 94 MINN. L.

Indeed, Madison repeatedly speaks of the legislature's pursuit of the "public good" and "public weal,"<sup>85</sup> and argues that representative democracy is more apt than direct democracy to pursue the public good: the

delegation of the government . . . to a small number of citizens elected by the rest [will] refine and enlarge the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern *the true interest of their country* and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations.<sup>86</sup>

Similarly, Madison writes in Federalist 57 that "[t]he aim of every political constitution is, or ought to be, first to obtain for rulers men who possess the most wisdom to discern, and most virtue to pursue *the common good of the society*; and in the next place, to take the most effectual precautions for keeping them virtuous whilst they continue to hold their public trust."<sup>87</sup> These are not the words of someone who wants or expects legislators to pursue their individual interests when they legislate. To the contrary, Madison's expectation seems to have been that legislators would be better suited than citizens to pursue the public good.

There are other reasons why Madison's views, whatever they might have been, should not be seen as a refutation of the necessity of a "public good" requirement. Madison was addressing the best way of structuring an alternative to monarchy, and why the proposed constitution should be ratified. The public good requirement, however, concerns something very different: an account of why, and under what conditions, republican governments can legitimately coerce their citizens. While political theorists before Madison had labored to justify the legitimacy of the exercise of governmental power,<sup>88</sup> this was not Madison's task, most likely because it was not the core issue on the American people's minds at the time of the Constitution's ratification. After all, *some* form of democracy was surely better than monarchy, and that was sufficient to recommend it as the desired political form.<sup>89</sup>

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REV. 105, 1052-57 (2010).

<sup>85</sup> See, e.g., THE FEDERALIST No. 10, at 82.

<sup>86</sup> *Id.* (emphasis supplied).

<sup>87</sup> THE FEDERALIST No. 57 (Madison), at 350 (emphasis supplied).

<sup>88</sup> For example, explaining the legitimacy of governmental power was central to both Locke and Rousseau, as discussed above in text. Indeed, during debates concerning the scope of the franchise in the aftermath of the Revolutionary War, a handful of Americans made this argument as well. See ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 11-12 (rev'd ed. 2000).

<sup>89</sup> This should not be surprising, for Madison was not a systematic political theorist. Robert Dahl demonstrates the profound theoretical inadequacies of Madison's political theories, concluding that Madison's Federalist Papers are better understood as an "ideology" that was designed to serve the political purpose of finding common ground to facilitate ratification. See ROBERT A. DAHL, *A PREFACE TO DEMOCRATIC THEORY* 4-33.

Moreover, questions concerning the legitimacy of a democracy's exercise of power over its citizens may not have had much resonance at that time, when only a fraction of citizens had the right to vote or hold office.<sup>90</sup> By contrast, questions of legitimacy are pressing in the modern era, where democracy is widespread, monarchy is rare, the concept of political equality among citizens is entrenched, and there is pervasive recognition that people of good will probably will never converge on what constitutes the "good life."<sup>91</sup> In this environment, the question of what legitimates the majority's exercise of power over a dissenting minority is pressing. Modernity permits – if not invites – the progressive refinements of enduring governmental institutions that were created in a relatively short period of time by people who had limited experience with democracy, and access to virtually no models of democratic institutions for guidance.<sup>92</sup> We should welcome, not denigrate, the opportunity to refine aspects of our democratic system that did not receive considered attention from the Founders.

The previous paragraph may resonate with "living constitutionalists," but would it be acceptable to originalists? The next subsection explains why it should be.

## 2. The Argument against Legitimate-Selection: the 'Democracy-Deficit Refutation'

Significantly more than half of the adult population did not have the franchise in 1789: all states except New Jersey withheld the franchise from women,<sup>93</sup> most states had property qualifications,<sup>94</sup> slaves could not vote, and several states excluded even free Blacks.<sup>95</sup> As a matter of principle, it is impossible to square such widespread disenfranchisement with Legitimate-

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<sup>90</sup> See KEYSSAR, *supra* note 88, at 3-21 (describing the limited franchise at that time).

<sup>91</sup> See, e.g., RAWLS, *supra* note 42, at 386; GAUS, *supra* note 50, at 2.

<sup>92</sup> See ROBERT A. DAHL, HOW DEMOCRATIC IS THE AMERICAN CONSTITUTION? 8-9 ("It is no detraction from the genius of Leonardo da Vinci to say that given the knowledge available in his time he could not possibly have designed a workable airplane . . . The knowledge of the Framers – some of them, certainly – may well have been the best available in 1787. But reliable knowledge about constitutions appropriate to a large representative republic was, at best, meager. History had produced no truly relevant models of representative government on the scale the United States had already attained, not to mention the scale it would reach in the years to come.").

<sup>93</sup> See Keysar, *supra* note 88, at 43-44. New Jersey ultimately disenfranchised women in 1807. See *id.*

<sup>94</sup> Only Vermont, New Hampshire, Pennsylvania and Georgia had no property requirements. New Hampshire imposed a poll tax, while Pennsylvania and Georgia had requirements that the voter have paid public taxes prior to the election. Every other state had property requirements. See *id.* at 306-07.

<sup>95</sup> Georgia, South Carolina, and Virginia formally extended the franchise only to Whites. See *id.* at 306-07. However, the number of states that excluded Blacks "rose steadily from 1790 to 1850." *Id.* at 44.

Selection.<sup>96</sup> As a doctrinal matter, however, doesn't the Founding era's democracy-deficit demolish this Article's claim that Legitimate-Selection is a *constitutional* principle? No: any such "democracy-deficit refutation" is without force, for three reasons.

*a. History*

History provides the first reason. As Akhil Amar has explained, much happened "in the nation's first eighty years to give rise to a more robustly egalitarian and nationalistic conception of republican government than had prevailed in the 1780s," including a "dramatic expansion of suffrage rights, at least among white men."<sup>97</sup> When Congress undertook acts in the nineteenth century that were predicated on the Guaranty Clause, Congress relied upon its more robust contemporary understanding of republicanism, not the Framers'. For example, Congress "judg[ed] local republicanism by applying dynamic democratic standards in the course of admitting new Western states," ensuring that the new states "met contemporary standards of republicanism."<sup>98</sup> Further, influential members of the Reconstruction Congress, including Senator Charles Sumner and Representative John Bingham, justified Congress' refusal to readmit the Southern states following the Civil War on the ground that those states' disenfranchisement of free Blacks rendered them unrepublican.<sup>99</sup> As Amar notes, "by 1865, any state that automatically disenfranchised a quarter or more of its freemen – as did each ex-rebel state -- was out of the American mainstream *in a way that it would not have been in 1787*."<sup>100</sup> In other words, it was the 1865-understanding of republicanism – not the Framers' understanding – that was the basis for refusing automatic readmission of the Southern states after the Civil War.

This historical record gives rise to the first reason why the democracy-deficit refutation is without force: our understandings of Republican Legitimacy should not be limited by the rules-of-the-road that were in place at our nation's founding. Rather, republicanism's requirements are appropriately determined on the basis of contemporary understandings. A dynamic approach to understanding republicanism is consistent with longstanding historical practice.

Two possible counter-arguments may be asserted. First, the fact that Congress understood republicanism dynamically does not mean this was correct; perhaps Congress acted for unprincipled self-serving reasons,<sup>101</sup> or

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<sup>96</sup> Though beyond the scope of this Article, some contemporary exclusions might be indefensible as well. *See* Richardson v. Ramirez, 418 U.S. 24 (1974) (upholding felony disenfranchisement).

<sup>97</sup> AKHIL REED AMAR, AMERICA'S CONSTITUTION: A BIOGRAPHY 370.

<sup>98</sup> *Id.* at 371.

<sup>99</sup> *See id.* at 370-76.

<sup>100</sup> *Id.* at 370 (emphasis supplied).

<sup>101</sup> For such a claim, *see* BRUCE ACKERMAN, TRANSFORMATIONS 107. For Amar's response, *see* AMERICA'S BIOGRAPHY, *supra* note 97, at 375 & n.44.

simply made a mistake. Second, in the alternative, such dynamic interpretation may be appropriate for Congress, but not for courts. These two counter-arguments, however, are refuted by the second reason, discussed immediately below, as to why the democracy-deficit refutation is without force.

*b. Meaning versus Application*

The democracy-deficit refutation has maximal traction under originalist premises. After all, whereas Legitimate-Selection requires widespread franchise, the Founders countenanced a system of widespread disenfranchisement at both the state and federal levels. And this disenfranchisement was not a result of oversight, but instead was an outgrowth of a theory of politics under which voting was seen as a “privilege” rather than a right, where only those with a “stake in society” were “sufficiently attached to the community and sufficiently affected by its laws to have earned the privilege of voting,” and where women were legally merged into their husbands and virtually represented by their votes.<sup>102</sup> Though our country’s early democracy-deficit might be troubling even to those who do not label themselves “originalists” – for even they think “history” and “tradition” are relevant to constitutional interpretation<sup>103</sup> -- those who do not self-identify as originalists rely on other considerations that allow for changing constitutional interpretations.<sup>104</sup> The Founding-era democratic-deficit, however, might appear to be an intractable obstacle for an originalist to conclude that Legitimate-Selection is a constitutional principle that requires widespread franchise.

But this is not so. Let us assume that an originalist were to agree with the textual and structural claims advanced in this Part that there must be a constitutional principle of Republican Legitimacy. Virtually all modern-day originalists still could conclude that our country’s early democracy-deficit does not limit the scope of our contemporary understanding of Republican Legitimacy. This is because most contemporary originalists draw a distinction between constitutional *meaning*, which they believe to be binding, and actual or expected *applications* of the Constitution, which they believe are not binding.<sup>105</sup> This distinction allows them to conclude that a specific view

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<sup>102</sup> See KEYSAR, *supra* note 88, at 8.

<sup>103</sup> See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* 8.

<sup>104</sup> See, e.g., *id.*

<sup>105</sup> See, e.g., Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s ‘Moral Reading’ of the Constitution*, 65 *FORDHAM L. REV.* 1269, 1284 (1997) (“Mainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong”); Michael Stokes Paulsen, *How to Interpret the Constitution (And How Not To)*, 115 *YALE L. J.* 2037, 2059 (2006) (rejecting a description of originalism as being a “version of crude intentionalism that focuses on the specific subjective intentions or expectations of individuals as to how a provision might be

or practice that coexisted with a constitutional enactment – say the “views or expectations of some individuals at the time [of the Fourteenth Amendment’s adoption] that the [Fourteenth] Amendment’s principle did not extend to segregated education” – was a non-binding “application” or “mistake[]” that is distinct from the binding original meaning of the Fourteenth Amendment.<sup>106</sup>

Mark Greenberg and Harry Litman have provided the most important theoretical explanation for the distinction between binding meaning and non-binding applications, and it is useful to work through their analysis to demonstrate more precisely why an originalist could conclude that our country’s early democracy-deficit is a non-binding application, rather than a binding meaning, of republicanism.<sup>107</sup> Like many other commentators, Greenberg and Litman understand “meaning” to refer to a word’s more

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applied” rather than “focusing on the objective linguistic meaning of the words of a text (taken in historical context)”; Randy Barnette, *An Originalism for Non-Originalists*, 34 LOYOLA L. REV. 611, 622 (1999) (distinguishing “semantic” from “expectations” originalism and concluding that “how the relevant generation of ratifiers expected or intended their textual handiwork would be applied to specific cases” is relevant only as “circumstantial evidence of what the more technical words and phrases in the text might have meant to a reasonable listener.”); Lawrence B. Solum, *We Are All Originalists Now*, in LAWRENCE B. SOLUM & ROBERT W. BENNETT, CONSTITUTIONAL ORIGINALISM: A DEBATE 10-11 (concluding that “it is the public meaning of the text (the linguistic meaning) that provides binding law. Expectations about the application of the text to particular cases or general types of cases provide relevant evidence of linguistic meaning, but it is only evidence”). It is worth noting that the meaning/application distinction also is important for some non-originalists. See, e.g., James Ryan, *The New Textualism*, 97 VA. L. REV. xx (forthcoming 2012) at 13 (“The Constitution, properly understood, is not frozen in time and inextricably linked to the concrete expectations of the framers or ratifiers. But neither does its meaning change . . . . What can change, however, is the application of those principles over time, based on technological, economic and cultural changes.”).

<sup>106</sup> Paulsen, *supra* note 105, at 2060.

<sup>107</sup> See Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L. J. 569 (1998). Mitch Berman has commented that Greenberg and Litman’s article “demolished” the proposition that “expected applications of constitutional provisions are binding on present-day interpreters.” Mitchell N. Berman, *Originalism and Its Discontents (Plus a Thought or Two About Abortion)*, 24 CONST. COMMENT. 383, 385 (2007) (commenting that was “demolished” in Greenberg and Litman’s article). I concur as to the article’s depth and importance, though I do not agree with all its analysis. I nonetheless rely on Greenberg and Litman’s article for present purposes because it has been influential for originalists, and aim to show that originalists have reasons internal to their commitments to reject the democracy-deficit refutation. My approach is similar to the Rawlsian idea of reasoning from conjecture. See RAWLS, *supra* note 65, at 155-56 (defining conjecture as arguing “from what we believe, or conjecture, are other people’s basic doctrines” even though “we do not assert [that is to say, personally accept or believe] the premises from which we argue, but [ ] we proceed as we do to clear up what we take to be a misunderstanding on others’ part”).

abstract, general articulation, and understand “application” to refer to the concrete particulars that fall within a word’s or principle’s “meaning.”<sup>108</sup> Greenberg and Litman then argue that applications are the result of a meaning’s interaction with factors extrinsic to meaning. In their words, “application may not be a reliable guide to meaning”<sup>109</sup> because “meaning is only one determinant of the things to which the speaker would apply the word.”<sup>110</sup> Greenberg and Litman go on to claim that a “speaker’s *substantive beliefs*” may affect application,<sup>111</sup> and conclude that “disagreement over whether a term applies in a particular case can be, *and generally is*, a *substantive disagreement*, rather than a misunderstanding about the word’s meaning, because what a word is applied to depends not only on meaning but also on substantive views.”<sup>112</sup>

For example, Greenberg and Litman note that the Founders would not have expected that the Contract Clause would operate in respect of a married woman’s contract. But this was because, during the Founding era, a married woman was not thought to be able to enter into her own contracts; her legal personality was conceptualized as having merged with her husband’s. Greenberg and Litman plausibly conclude that the Founders’ expectations concerning married women’s contracts are a non-binding application, not an aspect of the meaning of the Contract Clause.<sup>113</sup> The Founder’s expectation that the Contract Clause would not apply to married women’s contracts, say Greenberg and Litman, was due to a substantive belief external to the meaning of the Contract Clause, namely that married women could not create valid contracts. Accordingly, that expectation is non-binding, and an originalist could conclude today that the Contract Clause applies to contracts made by married women.<sup>114</sup>

Similarly, it seems plausible to say that our country’s early democracy-deficit (or many aspects of it, at least) was due to substantive beliefs extrinsic to the meaning of republicanism: for instance, the view that women could be virtually represented by their husbands, that a woman’s proper place was only in the domestic sphere, that women and non-Whites did not have the

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<sup>108</sup> See Greenberg & Litman, *supra* note 107, at 586-91; see also SOLUM, *supra* note 105, at 149 (“the linguistic meaning of [a] phrase is the more general meaning). This is not the only way that one can understand meaning. For one brief critique, See Robert W. Bennett, *Living with Originalism*, in SOLUM & BENNETT, *supra* note 105, at 113 (critiquing the underlying assumption of many who distinguish between meaning and application that “the meaning of vague or general language must itself be general”). A work-in-progress of mine builds on Wittgenstein’s theory of meaning to criticize and limit Greenberg and Litman’s argument. See Mark D. Rosen, *Stop the Beach and Originalism*.

<sup>109</sup> Greenberg & Litman, *supra* note 107, at 591.

<sup>110</sup> *Id.* at 588.

<sup>111</sup> *Id.* at 588-89.

<sup>112</sup> *Id.* at 590-91 (emphasis supplied).

<sup>113</sup> *Id.* at 585.

<sup>114</sup> See *id.*



requisite intelligence or moral attributes to participate in politics, or that only property-holders had a stake in society.<sup>115</sup> All of these are “substantive beliefs” that are extrinsic to the meaning of republicanism, and the concrete applications they produced accordingly would not be binding on Greenberg and Litman’s account. For this reason, even originalists can reject the democracy-deficit refutation.

Professor (and former Judge) Michael McConnell has put forward another reason for distinguishing between meaning and application. McConnell states that “[m]ainstream originalists recognize that the Framers’ analysis of particular applications could be wrong, or that circumstances could have changed and made them wrong.”<sup>116</sup> McConnell’s is a more limited justification than Greenberg and Litman’s because on the latter’s account applications can properly shift as substantive beliefs change even if the earlier substantive belief was not necessarily *wrong*. But even McConnell’s more limited understanding concerning the distinction between binding meaning and non-binding applications would suffice for present purposes: my guess is that most originalists would concede that our country’s early widespread franchise exclusions were either “wrong,” or that “circumstances . . . have changed and made them wrong” vis-à-vis what republicanism requires. If so, originalists’ understanding of the constitutional principle of Republican Legitimacy need not be limited by virtue of our country’s early democracy-deficit. And this is yet another reason why originalists can reject the democracy-deficit refutation.

Finally, it is worth noting that both McConnell’s and Greenberg & Litman’s accounts provide theoretical justifications for Congress’ dynamic approach to understanding what republicanism requires that Amar documents. These accounts also provide a retort to the possibility raised at the conclusion of the last subsection that *only* Congress properly has this power: there is no reason to conclude that courts would not have a role in sorting out binding meanings from non-binding applications.

### *c. Post-Guaranty Clause Amendments*

There is a final reason to reject the democracy-deficit refutation. As Professor Amar has forcefully argued, and as many originalists agree, the Constitution’s text should be read holistically, taking account of not only the original Constitution but its amendments as well.<sup>117</sup> “Each amendment aims to fit with, and be read as part of, the larger document. Indeed, because the

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<sup>115</sup> See KEYSAR, *supra* note 88, at 8.

<sup>116</sup> McConnell, *supra* note 105, at 1284.

<sup>117</sup> See Akhil Reed Amar, *Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000) (“The American People ratified the Philadelphia Constitution not clause by clause, but as a single document. Later generations of Americans have added amendments one by one, but no amendment stands alone as a discrete legal regime.”). For a ringing endorsement of Amar’s originalist methodology by another important originalist, see Paulsen, *supra* note 105.

People have chosen to affix amendments to the end of the document rather than directly rewrite old clauses, a reader can never simply look to an old clause and be done with it. Rather, *she must always scour later amendments to see if they explicitly or implicitly modify the clause at hand.*<sup>118</sup>

Accordingly, it would be incorrect to interpret the original Constitution's "republican form of government" clause without taking account of the many amendments that have "expanded our democracy by making citizens of former slaves, expanding the right to vote to include women and 18-year olds, [ ] abolishing the poll tax . . . [and] increased the voice of the people over the voice of corporations and insiders by allowing for the direct election of Senators."<sup>119</sup> Amar relies on these Amendments to conclude that the Guaranty Clause should be read "broadly" and "dynamically" such that exclusions from the franchise that were acceptable during the Founding era would not be constitutional today.<sup>120</sup> "We the People today must be expansive even if We the People at one time were less so."<sup>121</sup> Amar's conclusions are not limited to the question of franchise, but extend more generally to the circumstances that must obtain for republican government to be both legitimate and stable, *i.e.*, to Republican Legitimacy.

### 3. Republican Legitimacy or Anti-Corruption?

It might be argued that Republican Legitimacy is an unnecessary concept because it merely duplicates what some cases and scholarly writing has dubbed "anti-corruption."<sup>122</sup> This criticism fails because Republican Legitimacy is a doctrinally and conceptually superior framework, for two main reasons.

First, there is more solid textual grounding in the Constitution for concluding that "Republican Legitimacy" is an independent constitutional principle than there is for "anti-corruption." There is constitutional text -- the Guarantee Clause -- that speaks explicitly about republicanism, but none that mentions "corruption."<sup>123</sup> Though the Guarantee Clause only extends

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<sup>118</sup> *Id.* at 30 (emphasis supplied).

<sup>119</sup> Ryan, *supra* note 105, at 20.

<sup>120</sup> Amar, *supra* note 117, at 49-50.

<sup>121</sup> *Id.* at 50.

<sup>122</sup> *See* Teachout, *supra* note 9.

<sup>123</sup> Another phrase akin to Republican Legitimacy, "democratic integrity," also has appeared in some case law. *See, e.g.,* FEC v. Wisconsin Right to Life, 551 U.S. 449, 522 (2007) (Souter, J., dissenting). While I view the phrase "democratic integrity" as being virtually interchangeable with Republican Legitimacy, I prefer the latter for three reasons: (1) "republican" is more accurate because the Justices invoking "democratic integrity" have been referring to lawmaking by representatives rather than the people themselves, (2) "legitimacy" more accurately describes the idea that informs its contents than does "integrity" insofar as Republican Legitimacy concerns the preconditions for law to legitimately bind citizens, and (3) the terminology "Republican" facilitates recognition that Republican Legitimacy is an independent constitutional principle, for reasons explained above in text. I

its guarantee to states, it is hard to imagine that the federal government would have been charged with the responsibility of guaranteeing states a republican form of government if the federal government itself were not republican in form. And, of course, the Constitution explicitly *creates* a republican form of government at the federal level by making Congress elected by the people<sup>124</sup> -- something that Madison trumpeted in the *Federalist Papers*.<sup>125</sup> Once it is accepted that the Constitution establishes and guarantees republican forms of government at the federal and state levels, the conclusion that Republican Legitimacy is itself of constitutional stature readily follows: the Constitution's creation and guarantee of republican forms of government includes the minimum conditions that are necessary to ensure the stability and effectiveness of these institutions.<sup>126</sup>

It is harder to show that “anti-corruption” is an independent constitutional principle. Indeed, all but one of anti-corruption's proponents have treated it as a compelling government interest,<sup>127</sup> not a standalone constitutional principle.<sup>128</sup> Professor Teachout has provided an elegant and illuminating argument that anti-corruption rises to the level of a constitutional principle. While I am very sympathetic to her project, her constitutional argument is subject to a fundamental critique from which Republican Legitimacy is immune. Teachout grounds her constitutional conclusion on two virtually unassailable premises: (1) the Founders were concerned with the corruption of republican governments, and (2) many provisions of the Constitution were directed at countering corruption.<sup>129</sup> But

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recognize – and criticize the fact – that the proponents of “Democratic Integrity” have not treated it as a constitutional principle, but instead as a compelling governmental interest. *See supra* Part III.C.1.

<sup>124</sup> *See supra* Part II.A for a full discussion of how the Constitution creates a republican form of government vis-à-vis both Congress and the President.

<sup>125</sup> *See supra* note 22.

<sup>126</sup> For the complete argument, *see supra* Part II.A-B.

<sup>127</sup> While my proposal at present may be subject to the same criticism, *see supra* Part III.C (noting that the caselaw addressing aspects of Republican Legitimacy have treated them as compelling governmental interests, not a standalone constitutional principle), the doctrinal arguments for elevating Republican Legitimacy to a constitutional level are stronger than those for elevating anti-corruption.

<sup>128</sup> Indeed, Professor Issacharoff's recent article *On Political Corruption* in the *Harvard Law Review* considered what understanding of corruption could justify campaign finance regulations vis-à-vis free speech challenges, but did not argue that anti-corruption constituted an independent constitutional principle. *See* Samuel Issacharoff, *On Political Corruption*, 124 HARV. L. REV. 118, 119-20 (2010). Supreme Court caselaw likewise has treated political corruption as a compelling governmental interest. *See infra* Part III.C.1; *but see* Teachout, *supra* note 9, at 343 (arguing that anti-corruption is a “freestanding constitutional principle”).

<sup>129</sup> She rightly observes that “[t]he sizes of the [House of Representatives and the Senate], the mode of election, the limits on holding multiple offices, the limitations on accepting foreign gifts, and the veto override provision were all considered in light of concerns about corruption, and designed to limit legislators' opportunities to serve themselves.” Teachout, *supra* note 9, at 354. Teachout also relies on

her conclusion -- that there exists a standalone constitutional anti-corruption principle -- does not follow from these premises. That many constitutional provisions are designed to counter corruption hardly establish that there *also* exists a free-floating constitutional anti-corruption principle alongside these constitutionally-created anti-corruption features. After all, it could equally (or, arguably, even more persuasively) be said that the specific institutional features that the Constitution establishes to counter corruption exhaust the *Constitution's* anti-corruption provisions.

Second, “Republican Legitimacy” is conceptually superior to anti-corruption insofar as it better indicates its appropriate content than does anti-corruption. My critique of *Citizens United* in Part IV demonstrates this proposition at length.<sup>130</sup> The explanation of Republican Legitimacy’s conceptual superiority can begin here, though, with a critical analysis of Professor Teachout’s definition of political corruption. She says that political corruption is (1) “the use of [the] public forum to pursue private ends” and that (2) its “centerpiece” is “intent.”<sup>131</sup> From the vantage point of Republican Legitimacy, the first part of Teachout’s definition is accurate but incomplete; it correctly points to Legitimate-Decisionmaking, but problematically omits Legitimate-Selection. To illustrate the costs of Teachout’s conception, it provides no basis for criticizing partisan gerrymandering by stalwart republicans who aim to minimize the number of elected democrats not for the pursuit of “private ends,” but because they earnestly believe the democrats’ agenda to be bad for the country. Republican Legitimacy, by contrast, provides a basis for concluding that such political gerrymandering is wrong even if the gerrymanderers were not pursuing “private ends.”<sup>132</sup>

The second part of Teachout’s definition – the intent requirement – is flatly mistaken from the perspective of Republican Legitimacy. The legitimacy of the republican system can be undercut by negligence, oversight, and even well-intended actions. Actions that threaten Republican Legitimacy accordingly should be deemed unconstitutional regardless of intent. While corruption without wrongful intent might well be an oxymoron, intent’s irrelevance makes perfect sense within the conceptual framework of “Republican Legitimacy.”

Interestingly, Professor Issacharoff’s recent Harvard Law Review article *On Political Corruption* actually strengthens the case for Republican Legitimacy. This is so because the conception of “political corruption” that

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prohibition on titles of nobility, the treaty-making power, and the jury requirement in federal courts to ground her thesis. See id.

<sup>130</sup> See infra Part IV.C.

<sup>131</sup> Teachout, *supra* note 9, at 382; see also id. at 374-75 (defending the “understanding of corruption [that] focuses the discussion on the intent” of the actors).

<sup>132</sup> See infra Part IV.B (discussing political gerrymandering from the perspective of Republican Legitimacy).

Issacharoff ultimately champions is virtually identical to Republican Legitimacy. Look carefully at Issacharoff's analysis:

Any constitutional test resting on corruption as the evil to be avoided begs for a definition of the good, or, in this case, the uncorrupted. As in many areas of law in which the good state resists simple definition, the first insight may come from process questions – which campaign finance procedures are *likely to promote desirable forms of democratic governance* and which are likely to promote *infirmities in democracy*?<sup>133</sup>

Since Issacharoff is discussing campaign finance, it is clear that when he speaks of “democratic governance” he actually means “*representative* democracy.” And representative democracy, of course, is interchangeable with republicanism. If Issacharoff's aim is to generate legal tests that “promote desirable forms of [representative] democratic governance” and avoid “infirmities in [representative] democracy,” it would seem that “corruption” doesn't perform any real analytical work. Standing at the center of Issacharoff's analysis, instead, are considerations of what makes republican forms of government work well – considerations that are more accurately captured by the moniker Republican Legitimacy. It is better to use the more accurate terminology because, as will be explained shortly, the term “corruption” is misleading.<sup>134</sup>

### III. THE CASE LAW BEARING ON REPUBLICAN LEGITIMACY

Having derived Republican Legitimacy through textual and structural analysis of the Constitution, and elucidating Republican Legitimacy's contents through political theory, this Part shows to what extent Republican Legitimacy can be said to be already present in the Supreme Court's decided case law. To provide a quick overview, the two cases discussed in Part III.A provide some basis – albeit an inadequately theorized one -- for concluding that Legitimate-Selection is a constitutional principle. Part III.B shows many other cases where the Court has recognized the components of Republican Legitimacy.

These decisions are exceedingly helpful for three reasons. They help flesh out the contents of Republican Legitimacy, authenticate (for those who put trust in inductive reasoning) the conclusions of Part II.B's top-down, deductive reasoning, and provide a precedential foothold for this Article's claim. But the case law does not give Republican Legitimacy its full due – and hence does not qualify as decisive precedent for this Article's claim -- for two reasons. First, most of the cases treat the preservation of the conditions necessary to maintain the legitimacy of republicanism as sufficiently important governmental interests to justify regulation, but not as matters having independent constitutional status. Second, most of the cases have assimilated the preservation of the conditions necessary to maintain

<sup>133</sup> Issacharoff, *supra* note 123, at 126 (emphasis supplied).

<sup>134</sup> See *infra* Part IV.C (critiquing *Citizens United*).

republicanism into individual rights doctrines, rather than recognizing them as aspects of a *structural* constitutional principle. Part III.C explains why these two limits of the case law are significant. In so doing, Part III establishes why it is important that Republican Legitimacy be recognized as (a) standalone constitutional principle that is (b) structural rather than rights-based.

*A. The Most Direct Precedent for the Proposition that Republican Legitimacy is an Independent Constitutional Principle*

There is one case (possibly two) in which the Supreme Court has recognized that the prerequisites of representative democracy themselves can have constitutional status. It makes sense to discuss the cases chronologically because the second case relied on the first.

*Powell v. McCormack*<sup>135</sup> invoked a “fundamental principle of our representative democracy” as a guide to interpreting a constitutional grant of power to Congress. The question was whether the provision that “[e]ach House shall be the Judge of the . . . Qualifications of its own Members” gave the House the power to exclude a duly elected member on grounds apart from the three requirements (age, citizenship, and residency) specified elsewhere in the Constitution.<sup>136</sup> The Court held that “the Constitution does not vest in the Congress a discretionary power to deny membership by a majority vote,” relying *inter alia* on “an examination of the basic principles of our democratic system . . .”<sup>137</sup> A congressional power to discretionarily exclude duly elected congresspersons, continued the Court, would violate the “fundamental principle of our representative democracy” that “the people should choose whom they please to govern them.”<sup>138</sup>

*Powell*’s principle of “representative democracy” is synonymous with the contemporary understanding of republicanism.<sup>139</sup> *Powell*’s principle is an aspect of the first component of Republican Legitimacy, *i.e.*, Legitimate-Selection. And *Powell* is surely correct that a discretionary congressional power to exclude duly elected congresspersons would undermine the legitimacy of the representative process. For these reasons, *Powell* is strong precedent in support of Republican Legitimacy (or at least its first component).

But there are two important caveats. First, *Powell* does not explain from where its crucial decisional principle comes, but merely asserts it *ipse*

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<sup>135</sup> 395 U.S. 486, 547-48 (1969).

<sup>136</sup> See U.S. CONST. ART. I, §2, cl. 2 (“No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.”).

<sup>137</sup> 395 U.S. at 547-48 (emphasis supplied). The Court also considered the Framers’ intent “to the extent to which it could be determined.” *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> See *supra* note 22.

*dixit*. The derivation provided earlier in this Article provides solid grounding for *Powell*'s principle of "representative democracy." Second, *Powell* did not necessarily hold that its principle of "representative democracy" had constitutional status; *Powell* used representative democracy as an interpretive rule for construing a constitutional text, and interpretive rules do not necessarily themselves have the status of a constitutional principle.

Notwithstanding the two above caveats, the Supreme Court treated *Powell*'s "fundamental principle" as a full-fledged constitutional principle in *U.S. Term Limits, Inc. v. Thornton*.<sup>140</sup> *Thornton* struck down an amendment to Arkansas' constitution that set term limits for that state's federal representatives. *Thornton*'s self-proclaimed "most important" ground for its decision<sup>141</sup> was that term limits violated the "fundamental principle of our representative democracy [that] the people should choose whom they please to govern them."<sup>142</sup> In so doing, *Thornton* treated *Powell*'s principle as a constitutional principle, for *Thornton* considered it a sufficient basis for overturning the Arkansas law.<sup>143</sup> "Representative democracy" is synonymous with republicanism, and *Thornton*'s holding squarely concerned republicanism, striking down an aspect of the electoral system that the Court believed interfered with the process by which the people select their representatives. *Thornton* accordingly is solid precedent for the proposition that Legitimate-Selection is a constitutional principle.

But there are gaps in *Thornton*'s analysis. First, *Thornton* does not give a satisfactory explanation of the source of the "fundamental principle of our representative democracy;" it merely cites to *Powell*, which in turn merely asserted it. Second, *Thornton* provides little guidance as to its constitutional principle's appropriate scope. Fortunately, this Article's earlier analysis in Parts II.A and B addresses both these lacks.

#### B. *Additional Cases That Address the Two Components of Republican Legitimacy*

Many cases have recognized the significance of considerations that fall under the two components of Republican Legitimacy.

##### 1. The First Component: Legitimate-Selection

Let us first consider caselaw that has addressed matters that fall under the first component of Republican Legitimacy, Legitimate-Selection. The 1969 decision of *Kramer v. Union Free School District*,<sup>144</sup> concerned the constitutionality of a statute that barred an adult who lived with his parents from voting in a school board election. "[S]tatutes distributing the franchise constitute the foundation of our representative society. Any unjustified

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<sup>140</sup> 514 U.S. 779 (1995).

<sup>141</sup> *Id.* at 806.

<sup>142</sup> *Id.* at 783 (quoting *Powell v. McCormick*, 395 U.S. 486, 547 (1969)).

<sup>143</sup> *Id.* at 783.

<sup>144</sup> 395 U.S. 621 (1969).

discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government.”<sup>145</sup> *Kramer* struck down the statute, but on equal protection grounds.<sup>146</sup> It did not understand its concerns to be an independent constitutional principle.

The *per curiam* decision in *Purcell v. Gonzalez*<sup>147</sup> also addressed Legitimate-Selection when it tied its reasoning to the conditions that are necessary for republicanism to successfully operate. *Purcell* vacated an interlocutory injunction, thereby allowing state and county officials to apply Arizona’s new voter identification rules. The Court explained that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy.”<sup>148</sup> But *Purcell* held that “preserving the integrity of [a state’s] election process” constituted a “compelling interest,”<sup>149</sup> not an independent constitutional principle.

The most extensive discussion of the considerations that fall under the rubric of Legitimate-Selection is found in the campaign finance case law. *McConnell v. Federal Election Commission*<sup>150</sup> used the concept of Legitimate-Selection to frame its discussion of a century of federal campaign regulations:

More than a century ago the ‘sober-minded Elihu Root’ advocated legislation that would prohibit political contributions by corporations in order to prevent ‘the great aggregations of wealth, from using their corporate funds, directly or indirectly,’ to elect legislators who would ‘vote for their protection and the advancement of their interests as against those of the public.’ In Root’s opinion, such legislation would ‘stri[k]e at a constantly growing evil which has done more to shake the confidence of the plain people of small means of this country in our political institutions than any other practice which has ever obtained since the foundation of our Government.’ The Congress of the United States has repeatedly enacted legislation endorsing Root’s judgment.<sup>151</sup>

Supreme Court Justices also have relied on considerations of Legitimate-Selection when striking down campaign finance regulations. In *Randall v. Sorrell*,<sup>152</sup> the Court found unconstitutional a state campaign finance statute that imposed a \$200 per-candidate per-election contribution limit for candidates for state office. Justice Breyer, joined by Chief Justice Roberts and Justice Alito, explained that although contribution limits are not *per se* unconstitutional, courts must “recognize the existence of some lower bound”

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<sup>145</sup> *Id.* at 626.

<sup>146</sup> *Id.* at 630-33.

<sup>147</sup> 549 U.S. 1 (2006).

<sup>148</sup> *Id.* at 7.

<sup>149</sup> *Id.*

<sup>150</sup> 540 U.S. 93 (2003).

<sup>151</sup> *Id.* at 115 (internal quotations omitted).

<sup>152</sup> 548 U.S. 230 (2006).



because “[a]t some point the constitutional risks to the democratic electoral process become too great.”<sup>153</sup> Contribution limits that are too low can “harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, thereby reducing electoral accountability.”<sup>154</sup> Though Breyer’s reasoning reflected structural concerns, his plurality opinion grounded its holding in the First Amendment.<sup>155</sup>

## 2. The Second Component: Legitimate-Decisionmaking

Concerns that are part of the second component of Republican Legitimacy, Legitimate-Decisionmaking, also have been recognized by the Supreme Court. But before turning to that case law, three preliminary observations are in order. To date, the Court’s analysis has been institution-specific, with each case focusing on the branch of government (the legislature, the judiciary, and the executive) whose actions were the subject of the litigation. This is sensible insofar as each institution is genuinely distinctive<sup>156</sup> in respect of both its vulnerabilities to improper decisionmaking and as to what constitutes improper decisionmaking; for instance, a greater degree of objectivity is expected of courts than of legislatures. Nonetheless, that the Court has recognized a category of wrongful decisionmaking vis-à-vis all three branches confirms the proposition that Legitimate-Decisionmaking is a meaningful category in respect of *governmental* action, as a general matter.

### a. The Legislature

Proceeding to the case law, the Court long has recognized Legitimate-Decisionmaking vis-à-vis legislatures. In *United States v. Wurzbach*,<sup>157</sup> a unanimous opinion authored by Justice Holmes upheld a statute that barred members of Congress from receiving contributions for “any political purpose whatever” from any other federal employees. The Court upheld the statute on the grounds of Legitimate-Decisionmaking: “Congress may provide that its officers and employees” shall not be “*subjected to pressure for money for political purposes*, upon or by others of their kind, while they retain their office or employment.”<sup>158</sup>

Consider as well the recent decision in *Nevada Commission on Ethics v. Carrigan*.<sup>159</sup> Nevada law prohibits state and municipal legislators from

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<sup>153</sup> *Id.* at 248 (emphasis supplied).

<sup>154</sup> *Id.* at 249.

<sup>155</sup> *Id.* at 261-62.

<sup>156</sup> For an extended analysis of how the different institutional characteristics of each branch of government should influence constitutional doctrine, *See* Mark D. Rosen, *The Surprisingly Strong Case for Tailoring Constitutional Principles*, 153 U. PA. L. REV. 1513 (2005).

<sup>157</sup> 280 U.S. 396, 398 (1930).

<sup>158</sup> *Id.* at 398-99 (emphasis supplied).

<sup>159</sup> 131 S. Ct. 2343 (2011).

“vot[ing] upon or advocat[ing] the passage or failure of” any “matter with respect to which the independence of judgment of a reasonable person in his situation would be materially affected by . . . [h]is commitment in a private capacity to the interests of others.”<sup>160</sup> The Court upheld Nevada’s law against a First Amendment challenge because, *inter alia*, such “generally applicable conflict-of-interest recusal rule[s]” have been “commonplace for over 200 years” in both Congress and state legislatures.<sup>161</sup> For example, within a week of the House of Representative’s having obtained a quorum, it enacted a rule that “[n]o member shall vote on any question, in the event of which he is immediately and particularly interested.”<sup>162</sup> And although “[t]he first Senate rules did not include a recusal requirement, . . . Thomas Jefferson adopted one when he was President of the Senate.”<sup>163</sup> It provided that that “where the private interests of a member are concerned in a bill or question, he is to withdraw. And where such an interest has appeared, his voice [is] disallowed . . .”<sup>164</sup>

Interestingly, Jefferson’s Senate rule justified itself by resort to foundational principles of political theory similar to those invoked above in Part II.B: “In a case so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own case, it is for the honor of the house that his rule, of immemorial observance, should be strictly adhered to.”<sup>165</sup> Buttressing this Article’s claim that Legitimate-Decisionmaking is not branch-specific but instead is applicable to governmental action in general, the Senate drew upon an analogy from the judiciary, noting that a person may not be a “judge in his own case.”<sup>166</sup> The *Carrigan* decision likewise relied on the fact that “[f]ederal conflict-of-interest rules *applicable to judges* also date back to the founding.”<sup>167</sup>

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<sup>160</sup> Nev.Rev.Stat. §281A.420(2), cited in *Carrigan*, 131 S. Ct. at 2347. The Court understood that the statute barred legislators from “advocating [the proposal in which he has a conflict’s] passage or failure during the legislative debate.” Id.

<sup>161</sup> Id. at 2348. For more of the majority’s reasoning, See *infra* note 167.

<sup>162</sup> 1 ANNALS OF CONG. 99 (1789), quoted in *Carrigan*, 131 S. Ct. at 2348.

<sup>163</sup> See *Carrigan*, 131 S. Ct. at 2348.

<sup>164</sup> A MANUAL OF PARLIAMENTARY PRACTICE FOR THE USE OF THE SENATE OF THE UNITED STATES 31 (1801), quoted in *Carrigan*, 131 S. Ct. at 2348.

<sup>165</sup> Id.

<sup>166</sup> Id.

<sup>167</sup> Id. at 2348 (emphasis supplied). Curiously, Justice Scalia’s majority opinion in *Carrigan* did not uphold Nevada’s law on the ground that it was backed by a compelling governmental interest, but instead concluded that no speech rights were implicated for two reasons. See id. at 2350. First, legislative power “is not personal to the legislator but belongs to the people; the legislator has no personal right to it.” Id. Second, “the act of voting [by a legislator] symbolizes nothing” and therefore is not an “act of communication” to which the First Amendment applies. Id. at 2350.

The majority’s reasoning is peculiar. Justices Kennedy and Alito each wrote separate concurrences, with which I largely agree, strongly criticizing the majority’s premise that anti-recusal laws do not implicate speech. See id. at 2352-53 (Kennedy, J., concurring); id. at 2354 (“I do not agree with the opinion of the Court insofar as

The concern of Legitimate-Decisionmaking also is present in the modern campaign finance case law. Since the landmark 1976 decision of *Buckley v. Valeo*, the Court has held that “[t]o the extent that large contributions are given to secure a political quid pro quo from current and potential office holders, the integrity of our system of representative democracy is undermined.”<sup>168</sup> Behind *Buckley*’s delegitimation of quid pro quo contributions is a theory of Legitimate-Decisionmaking that identifies some motivations behind congressional decisionmaking as being wrongful.

To be sure, Legitimate-Decisionmaking’s scope vis-à-vis Congress has been a matter of deep controversy at the Supreme Court. Many cases have understood Legitimate-Decisionmaking to demand the satisfaction of strict criteria. For example, in upholding the Bipartisan Campaign Reform Act’s ban on national parties’ involvement with soft money, the majority opinion in *McConnell v. FEC*<sup>169</sup> cited to earlier cases that had recognized the legitimacy of regulations aimed at combating “undue influence on an officeholder’s judgment”<sup>170</sup> and “the broader threat from politicians too compliant with the wishes of large contributors.”<sup>171</sup> *McConnell* also provided the Court’s most expansive discussion to date of its theory of Legitimate-Decisionmaking when it spoke of the “danger that officeholders will decide issues not on the merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder.”<sup>172</sup> However, in the Court’s more recent decision on this issue – the controversial *Citizens United* case -- a five Justice majority retreated from *McConnell*’s view, holding instead that quid-pro-quo exchanges are the only types of illegitimate decisionmaking that can be regulated by Congress.<sup>173</sup> Justice Stevens’ lengthy dissent for four Justices reiterated *McConnell*’s understanding that “undue influence” extends beyond quid-pro-

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it suggests that restrictions upon legislators’ voting are not restrictions upon legislators’ speech”) (Alito, J., concurring). Further, as to the majority’s first reason, it is in tension with *Citizen United*’s confirmation of *corporations*’ first amendment rights despite the fact that corporations cannot be said to have “personal” rights. See *Citizens United*, 130 S. Ct. at 899-900. It is more plausible to conclude that restricting legislators’ ability to advocate and vote indeed restrict speech, but that they are not “impermissible restrictions on freedom of speech” because there are sufficiently important interests – preserving Republican Legitimacy – to justify them. *Carrigan*, 131 S. Ct. at 2355 (Alito, J., concurring).

<sup>168</sup> *Buckley v. Valeo*, 424 U.S. 1, 26-7 (1976). This holding has been reaffirmed countless times, including in the Court’s recent decision of *Citizens United*, a decision that constitutes a severe retrenchment of campaign finance laws. See *Citizens United v. FEC*, 130 S. Ct. 876, 909-10 (2010).

<sup>169</sup> 540 U.S. 93 (2003).

<sup>170</sup> *Id.* at 150 (quoting *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 441 (2001)).

<sup>171</sup> *McConnell*, 540 U.S. at 150 (quoting *Nixon v. Shrink Missouri PAC*, 528 U.S. 377, 389 (2000)).

<sup>172</sup> *McConnell*, 540 U.S. at 153.

<sup>173</sup> See *infra* Part IV.C.1.

quo exchanges.<sup>174</sup> Justice Stevens said regulations combating such influences serve as “safeguard[s]” to protect the very “legitimacy of our political system” against “threat[s] to republican self-government.”<sup>175</sup> Yet as important as *Citizens United* is in having cut back its understanding of Legitimate-Decisionmaking, it is important to recognize that all Justices still accept *some* theory of Legitimate-Decisionmaking vis-à-vis Congress insofar as quid-pro-quo exchanges still are deemed illegitimate by all the Justices.

*b. The Executive Branch*

Legitimate-Decisionmaking also has been applied to the executive branch in the caselaw upholding limits on the political activities of federal executive branch employees. An 1882 case upheld a law prohibiting federal employees “from giving or receiving money for political purposes from or to other employees of the government.”<sup>176</sup> More recent cases<sup>177</sup> upheld the Hatch Act, which bars federal employees from taking an “active part in political management or political campaigns.”<sup>178</sup> The Court upheld a wide array of statutory prohibitions<sup>179</sup> on Legitimate-Decisionmaking grounds,<sup>180</sup> crediting Congress’ judgment that “an actively partisan governmental personnel threatens good administration . . .”<sup>181</sup> The Court endorsed Congress’ concern regarding the “danger” to the public that “governmental favor may be channeled through political connections” if governmental workers were permitted to engage in the proscribed activities.<sup>182</sup> The Court upheld Congress’ support for the “principle of required political neutrality for classified public servants” so as to promote “integrity in the discharge of

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<sup>174</sup> See *Citizens United*, 130 S. Ct. at 961 (Stevens, J., dissenting).

<sup>175</sup> *Citizens United*, 130 S. Ct. at 963-64; 968-69.

<sup>176</sup> *Mitchell*, 330 U.S. at 967 (describing holding of *Ex parte Curtis*, 106 U.S. 371 (1882)).

<sup>177</sup> See *U.S. Civil Service Comm’n v. Nat’l Ass’n of Letter Carriers AFL-CIO*, 413 U.S. 548 (1973); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947).

<sup>178</sup> *Letter Carriers*, 413 U.S. at 554.

<sup>179</sup> The Hatch Act barred employees of the executive branch from “holding a party office, working at the polls, and acting as party paymaster for other party workers,” and Congress also could ban such employees from “organizing a political party or club; actively participating in fund-raising activities for a partisan candidate or political party; becoming a partisan candidate for, or campaigning for, an elective public office; actively managing the campaign of a partisan candidate for public office; initiating or circulating a partisan nominating petition or soliciting votes for a partisan candidate for public office; or serving as a delegate, alternate or proxy to a political party convention.” *Id.* at 556.

<sup>180</sup> *Id.* at 556 (holding that “neither the First Amendment nor any other provision of the Constitution invalidates a law barring this kind of partisan political conduct by federal employees”)

<sup>181</sup> *Id.* at 555 (internal quotation omitted).

<sup>182</sup> *Mitchell*, 330 U.S. at 98; *Letter Carriers*, 413 U.S. at 555 (quoting and reaffirming).

official duties”<sup>183</sup> and to “deal with what many sincere men believe is a material threat to the democratic system.”<sup>184</sup>

### *c. The Judiciary*

Finally, as to Legitimate-Decisionmaking in the judiciary, consider the recent decision of *Caperton v. A.T. Massey Coal Co., Inc.*<sup>185</sup> *Caperton* held that a state supreme court justice should have recused himself from a case in which the president and chief executive officer of one of the parties in a case had made substantial campaign contributions for the justice’s re-election, at a time when it was likely that the corporation would be seeking review of a trial court’s entry of a \$50 million judgment against the corporation. The Supreme Court grounded its ruling in the proposition that “[a] fair trial in a fair tribunal is a basic requirement of due process,”<sup>186</sup> and held that a judge must recuse himself where “there is an unconstitutional ‘potential for bias’” on the basis of “a realistic appraisal of psychological tendencies and human weakness.”<sup>187</sup> *Caperton* found this standard to have been met “when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge’s election campaign when the case was pending or imminent.”<sup>188</sup>

### *C. Limitations of the Case Law*

The case law surveyed above in Part III.B supports this Article’s claim that Republican Legitimacy is an independent structural constitutional principle,<sup>189</sup> but does not fully establish the Article’s claim for two reasons.

#### 1. Compelling Interests versus Independent Constitutional Principles

Apart from *Thornton* (and arguably *Powell*), the case law examined above treated Legitimate-Selection and Legitimate-Decisionmaking as governmental interests sufficient to justify governmental regulation (generally “compelling” governmental interests), but not as components of a standalone constitutional principle. While useful, that case law does not go far enough because there are four critical differences between a compelling governmental interest and a full-fledged constitutional principle. I sketch these four differences below, and fully develop them later in Part IV.

First, whereas a compelling governmental interest is a defense for government regulation judicially challenged as infringing a constitutional

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<sup>183</sup> *Mitchell*, 330 U.S. at 97.

<sup>184</sup> *Id.* at 99.

<sup>185</sup> 129 S. Ct. 2252 (2009).

<sup>186</sup> *Id.* at 2259 (internal quotation omitted).

<sup>187</sup> *Id.* at 2262-63 (internal quotations omitted).

<sup>188</sup> *Id.* at 2263-64.

<sup>189</sup> *See supra* p. 26.

commitment judicially protected by strict scrutiny, independent constitutional principles also can operate as a sword to *challenge* governmental action. For instance, a compelling governmental interest could not have been used to judicially invalidate Indiana's voter-identification law in the *Crawford* case, whereas a constitutional principle could have.<sup>190</sup>

Second, a constitutional interest may motivate legislatures differently than would a compelling governmental interest. Legislators may act more responsibly if they believe their participation is necessary to fully realize a constitutional commitment than if they are told that there is a "compelling governmental interest" that they act in a particular way.<sup>191</sup> After all, compelling governmental interests are (mere) policies, whereas constitutional commitments are something more.<sup>192</sup>

Third, the failure to recognize a full-fledged constitutional principle distorts analysis when that principle runs up against a competing constitutional commitment.<sup>193</sup> In such a circumstance, the failure to recognize the constitutional consideration – and treating it instead as "merely" a compelling governmental interest -- can erroneously oversimplify the situation, making it appear that only a single constitutional value is at stake. The overlooked constitutional principle might not be given the dignity it deserves when a legislature considers whether to legislate or a court reviews legislation.

Fourth, recognizing that there are competing constitutional considerations makes clear that the situation at hand involves a conflict of competing constitutional commitments.<sup>194</sup> This should have doctrinal consequences for courts. The understanding that a legislature's decision reflects a considered effort to harmonize competing constitutional commitments, rather than a decision implicating only a single constitutional principle, should generally lead to greater judicial deference to the legislative judgment because legislatures are better suited than courts, on grounds of both institutional competency and democratic legitimacy, to reconcile competing and incommensurable constitutional commitments.<sup>195</sup>

For all these reasons, there is a meaningful difference between a compelling governmental interest and an independent constitutional principle.

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<sup>190</sup> See *infra* Part IV.A.

<sup>191</sup> See generally DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS (showing congressional interpretation and implementation of the Constitution).

<sup>192</sup> See Rosen, *supra* note 21.

<sup>193</sup> See *infra* Part IV.C.2.

<sup>194</sup> See *id.*

<sup>195</sup> See *id.*

## 2. The Distinction Between Individual Constitutional Rights and Structural Constitutional Principles

This Article's claim is that Republican Legitimacy is a *structural* constitutional principle consisting of the conditions necessary to ensure that both our constitutionally created federal government as well as the States are functional and stable republican governments.<sup>196</sup> With the exception of the *Thornton* and *Powell* decisions, however, the cases have addressed aspects of Republican Legitimacy in the course of analyzing individual rights-based claims based on the equal protection and free speech clauses. This is a second respect in which most of the case law has not given Republican Legitimacy its full due: the minimal conditions necessary for Legitimate-Selection and Legitimate-Decisionmaking are facets of constitutional structure, not aspects of individual rights.

But does it *matter* whether a constitutional principle is deemed to be individual rights-based or structural? A long-standing scholarly debate addresses this very question. On the one side, Professors Richard H. Pildes, Samuel Issacharoff, and Pam Karlan have argued that many election law questions implicate structural constitutional principles, and that attempting to address structural constitutional harms by rights-based constitutional doctrines is problematic.<sup>197</sup> On the other side, Professor Richard Hasen, denies the existence of structural constitutional principles in the election law context.<sup>198</sup> Professor Guy Charles splits the baby, arguing that "it is immaterial whether one casts political rights claims in a structuralist or individualist frame."<sup>199</sup>

This Article falls squarely on, and builds upon, the Pildes, Issacharoff and Karlan side of the debate. It does so in two ways, critically and constructively. First, in the subsection immediately below I critically analyze Professor Hasen's and Professor Charles' arguments against structural constitutional principles. The constructive support of structuralism appears after that, in Part IV, where I identify reasons why constitutional rights cannot be counted on to adequately protect structural constitutional

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<sup>196</sup> Those aspects of Republican Legitimacy that help implement the guarantee that the states also have republican forms of government likewise are concerned with structure.

<sup>197</sup> See, e.g., Richard H. Pildes, *The Supreme Court, 2003 Term – Foreword: The Constitutionalization of Democratic Politics*, 118 HARV. L. REV. 28 (2004); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643 (1998); Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345 (2001).

<sup>198</sup> See RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE* 138-156 (NYU Press 2003).

<sup>199</sup> Guy-Uriel Charles, *Judging the Law of Politics*, 103 MICH. L. REV. 1099, 1131 (2005).

principles<sup>200</sup> and show fallout from the Court's failure to treat Republican Legitimacy as a structural principle.

*a. Critiquing Professor Hasen's Wholesale Rejection of Structural Principles in the Electoral Context*

Professor Hasen, among this nation's leading election law scholars, argues that "structural theories are all about individual and group rights after all."<sup>201</sup> He "see[s] nothing normatively improper (much less constitutionally intolerable) about a practice that causes no harm to individuals or groups of individuals."<sup>202</sup>

The effort to collapse structural concerns into individual and group rights is mistaken for several reasons. First, it is inconsistent with constitutional text. Some constitutional provisions are primarily directed to securing the interests of individuals, others to constituting or securing governmental institutions. It is no surprise that the Fourteenth Amendment's charges that States shall not "deprive *any person* of life, liberty or property without due process of law" or "*deny to any person . . . the equal protection of the laws*" have been primarily conceptualized as generating individual rights despite the fact that due process and equal protection have downstream consequences as to how governmental institutions operate. Conversely, the requirement that the President "give to the Congress Information of the State of the Union," and those of the Bicameralism and Presentment Clauses, are best understood as structural requirements that determine the character of governmental institutions, though they also have downstream effects on individuals.<sup>203</sup>

Second, Hasen's effort to collapse the distinction between structure and individual rights is troublesome because individual rights and structural interests are conceptually distinct. In one direction, individual rights can be violated even if a governmental institution cannot be improved upon. For example, a rogue or absent-minded police officer may wrongfully search a citizen's home despite the fact that a fully adequate governmental policy is in place. In other words, even if there's nothing structurally wrong with a governmental institution or policy, individual rights can be harmed. In the other direction, there can be structural damage even if a governmental action

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<sup>200</sup> First, individual rights doctrines focus attention primarily on individuals, and in so doing can lead courts to overlook structural harms; it is easy to overlook considerations that doctrine doesn't indicate are legally significant. *See infra* text and note 248. Second, sub-doctrines developed in (and sensible in) the context of individual rights may have unintended consequences if applied to structural constitutional values. *See infra* text and note 255; *see infra* text and note 262.

<sup>201</sup> *See* HASEN, *supra* note 198, at 156.

<sup>202</sup> *Id.* at 152.

<sup>203</sup> For example, the State of the Union informs citizens, and the Bicameralism and Presentment requirements determine what creates federal law that is binding on citizens.



imposes no harm to an individual. Consider, for example, a hypothetical statute giving Congress the power to approve the ambassadors proposed by the President. Because the Constitution grants the President the power to appoint ambassadors with the advice and consent of the Senate,<sup>204</sup> such a statute would enlarge the House's power vis-à-vis ambassadors and correspondingly diminish the Senate's and President's powers. This would impose a structural harm to the governmental system established by the Constitution, despite the fact that it would not seem to harm individual citizens.<sup>205</sup>

To generalize, much of what the Constitution does is to establish governmental entities and determine the relationship among them. There is no reason to think that there cannot be constitutional harms to these inanimate governmental structures. And, indeed, the Supreme Court long has policed against improper incursions against these institutions by means of the structural constitutional principles known as separation of powers and federalism.

Professor Hasen probably does not deny the existence of structural principles in general, but only thinks that election law should be analyzed under the rubric of equality, not structure.<sup>206</sup> Even this more moderate position is untenable because it is not the case that all constitutional concerns in the voting context boil down to equality.<sup>207</sup> *Republican Legitimacy*, for instance, concerns what is necessary to maintain the legitimacy and stability of the republican forms of government that the Constitution creates and guarantees, matters that are not reducible to "equality." It does not slight Equal Protection to recognize that democracy's rules-of-the-road implicate other constitutional principles as well.

At least part of what drives Professor Hasen is the hope of having "apples-to-apples comparisons" among constitutional principles.<sup>208</sup> But an attempt to reduce everything to equal protection is misbegotten if, as this Article's analysis suggests, multiple constitutional principles are implicated in the rules-of-the-road context.<sup>209</sup> Analysis unavoidably becomes complex when multiple incommensurable constitutional principles point to different outcomes. The attempt to reduce distinctive, incommensurable constitutional commitments into a single constitutional currency purchases

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<sup>204</sup> U.S. Const. Art. II, §2, cl. 2.

<sup>205</sup> The conclusion would be no different if one were to instead characterize the statute as harming every United States citizens' right to have an ambassador chosen by the President with the advice and consent of the Senate.

<sup>206</sup> See *id.* at 153-56.

<sup>207</sup> Professor Hasen summarizes his book as an argument that courts' sole role is to be the actor of "last resort who must referee some high-stakes political battles and protect basic rights of political equality" and closes his book with a chapter entitled "Equality, Not Structure."

<sup>208</sup> *Id.* at 156.

<sup>209</sup> To be specific: *Republican Legitimacy*, as well as such individual rights principle as free speech and equal protection.

resolvability only at the cost of distortion.

Further evidence that there is a meaningful distinction between individual rights and structural constitutional interests is that this distinction already is embedded in much constitutional doctrine.<sup>210</sup> For example, the distinction between individual rights and structural interests helps explain why some constitutional matters can be waived and others cannot.<sup>211</sup> It is the individual, personal nature of the right against self-incrimination and the Sixth Amendment right against unlawful search and seizure that makes these constitutional matters waivable by individuals. Conversely, as the Supreme Court has explained, federalism's constitutional requirements may not be waived by States because they are structural.<sup>212</sup> Likewise, parties to a litigation cannot waive Article III's "structural" protections,<sup>213</sup> which guard the "role of the independent judiciary within the constitutional scheme of tripartite government."<sup>214</sup> Similarly, it is unthinkable that the President or Congress could waive Presentment. To generalize, individuals cannot waive structural constitutional requirements because such matters are not "theirs" to waive on account of their structural character. Permitting waiver of structural values would put such interests at risk.

Professor Hasen also argues that structuralism reflects "judicial hubris" and that courts should not "make deeply contested normative judgments about the appropriate functioning of the political process" that structuralism entails.<sup>215</sup> This argument fails because "[s]tructuralism is not necessarily juriscentric . . ."<sup>216</sup> The question of whether a structural principle exists is wholly distinct from the question of which institution, courts or legislatures, is primarily (or exclusively) responsible for implementing it.<sup>217</sup> Indeed, several structural constitutional principles are exclusively or primarily the responsibility of Congress; for instance, the Constitution's guarantee that

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<sup>210</sup>This argument is a species of the inductive reasoning that undergirds common law reasoning insofar as it draws a general principle from decisions that were rendered in specific contexts. See generally BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22-23 (1921) (the "common law does not work from pre-established truths of universal and inflexible validity to conclusions derived from them deductively," but "[i]ts method is inductive, and it draws its generalizations from particulars.").

<sup>211</sup>See, e.g., *Peretz v. United States*, 501 U.S. 923, 936 (1991) ("litigants may waive their *personal* right to have an Article III judge preside over a civil trial. The most basic rights of criminal defendants are similarly subject to waiver") (emphasis supplied); See generally Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 810 (2003).

<sup>212</sup>*NY v. United States*, 505 U.S. 144 (1992).

<sup>213</sup>See *CFTC v. Schor*, 478 U.S. 833, 850-51 (1986).

<sup>214</sup>See *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 583 (1985).

<sup>215</sup>Hasen, *supra* note 201, at 153.

<sup>216</sup>See Charles, *supra* note 199, at 1113.

<sup>217</sup>For example, constitutional principles that are non-justiciable political questions exist and are implemented by non-judicial institutions. See generally *Baker v. Carr*, 369 U.S. 186 (1962).

States are to have republican forms of government falls to Congress under current doctrine,<sup>218</sup> as does the Tenth Amendment's federalism limitations on Congress' legislative powers.<sup>219</sup> Similarly, primary responsibility for implementing Republican Legitimacy falls with the legislative branch.<sup>220</sup>

*b. Critiquing Professor Charles' Claim that the Distinction  
Between Rights and Structure is Immaterial*

Let us next consider Professor Charles' claim that "it is immaterial whether one casts political rights claims in a structuralist or individualist frame."<sup>221</sup> Charles' provides two justifications for his conclusion.

First, Charles argues that "whenever the Court uses rights-speak, the Court is doing so instrumentally *to mask and rectify structural concerns*."<sup>222</sup> Unlike rights claims that are grounded in equal protection or free speech, structural claims do not have any clear textual basis and for that reason, says Charles, have an air of illegitimacy. Treating structural principles as rights claims "provides the patina of constitutional legitimacy – the assurance (or illusion) that courts are not simply fashioning doctrine out of whole cloth without regard to the constitutional text."<sup>223</sup>

I think there is something self-evidently unsatisfying with Charles' claim that rights claims are a ploy to give textual grounding to judicial decisions. But beyond unsavory duplicity, it is unnecessary. Some structural principles are reasonably inferred from constitutional text.<sup>224</sup> Moreover, structural inferences are a well-accepted mode of constitutional interpretation, as is demonstrated by the well-accepted doctrines of "separation of powers" and federalism – both of which are structural principles that are derived by inference, not from explicit constitutional text.

Charles' second argument is that "structural claims in law and politics, which generally stem from democratic theory, are often amorphous esoteric ideals that are difficult to domesticate for adjudicative purposes."<sup>225</sup>

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<sup>218</sup> See *id.*

<sup>219</sup> *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

<sup>220</sup> See Rosen, *supra* note 21.

<sup>221</sup> Charles, *supra* note 199, at 1131.

<sup>222</sup> *Id.* (emphasis supplied).

<sup>223</sup> *Id.*

<sup>224</sup> For the classic argument, See CHARLES L. BACK, JR., *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969). For a more recent articulation, See Amar, *supra* note 117, at 28-30 ("For example, the phrases 'separation of powers' and 'checks and balances' appear nowhere in the Constitution, but these organizing concepts are part of the document, read holistically. Each of the three great departments-- legislative, executive, judicial--is given its own separate article, introduced by a separate vesting clause. To read these three vesting clauses as an ensemble (as their conspicuously parallel language and parallel placement would seem to invite) is to see a plain statement of separated powers.")

<sup>225</sup> *Id.* at 1126.

Individual rights claims remedy this difficulty, Charles asserts, because

[a]n individual rights framework is how courts translate structural values into adjudicatory claims capable of resolution by jurists as opposed to philosophers or policymakers . . . . An individual rights framework also helps courts think more concretely about structural problems and may direct them toward judicially manageable remedies.<sup>226</sup>

There are several problems with this argument. First, the claim that “[a]n individual rights framework [ ] helps courts think more concretely about structural problems”<sup>227</sup> confuses the benefits of case-by-case adjudication with individual rights. It is case-by-case adjudication – not individual rights – that has allowed courts to concretely express what various individual rights require. For example, the contents of and values behind the individual rights of “free speech” and “equal protection” were initially “amorphous” and “esoteric” in the sense that they were difficult to explain,<sup>228</sup> and were only made concrete over time by the Court’s case-by-case, common law reasoning. Conversely, courts have given concrete expression to structural values (such as separation of powers) through case-by-case adjudication.<sup>229</sup>

Second, Charles’ argument fails to explain *how* the use of individual rights “translate[s] structural values” into claims that vindicate those structural values.<sup>230</sup> Professor Pildes has strenuously argued that it is impossible to protect structural values if one begins reasoning from individual rights,<sup>231</sup> and Charles’ argument does not respond to this. Part IV provides several concrete examples of Pildes’ general claim as it demonstrates three reasons why individual rights cannot be relied upon to protect structural constitutional values.<sup>232</sup>

#### IV. REPUBLICAN LEGITIMACY’S EXPLANATORY POWER: REVISITING THREE SUPREME COURT CASES

Republican Legitimacy reworks the analysis of many controversies concerning representative democracy’s rules-of-the-road. This Part IV applies Republican Legitimacy to (1) the voter-identification law that was

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<sup>226</sup> *Id.* at 1128.

<sup>227</sup> Charles, *supra* note 199, at 1128.

<sup>228</sup> *See, e.g.*, LEONARD LEVY, *LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY* 4 (1960) (“The meaning of no other clause of the Bill of Rights at the time of its framing and ratification has been so obscure to us” as the Free Speech and Press Clause).

<sup>229</sup> *See, e.g.*, *INS v. Chadha*, 462 U.S. 919 (1983).

<sup>230</sup> Charles, *supra* note 199, at 1128.

<sup>231</sup> Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1606 (1999) (“The content of political rights in these cases necessarily derives from a judgment about the proper structural aims to attribute to democracy.”).

<sup>232</sup> For a brief overview of these reasons, and cross-references to where the arguments are made, *see supra* note 200.

challenged in *Crawford*, (2) partisan gerrymandering, which was declared a non-justiciable political question in *Vieth*, and (3) the campaign finance regulation struck down in *Citizens United*. My analysis of *Crawford* and *Vieth* demonstrates two reasons why it is crucial to understand Republican Legitimacy as a “structural” constitutional principle, rather than assimilating it into an individual constitutional right: (a) individual rights doctrines focus attention primarily on individuals, and in so doing can lead courts to overlook structural harms, and (b) sub-doctrines developed in the context of individual rights may have unintended consequences if applied to structural constitutional values. The analysis of *Citizens United* shows why Republican Legitimacy is superior to “anti-corruption” as a conceptual and doctrinal framework, and demonstrates the significance of recognizing that Republican Legitimacy is a standalone constitutional principle.

#### A. *Crawford* and Voter Identification

Republican Legitimacy alters analysis of the voter identification law challenged in *Crawford* in two fundamental respects. First, by focusing attention on the representative system and not just individuals, Republican Legitimacy shows that the plurality opinions overlooked many legally relevant facts. Second, Republican Legitimacy explains why two doctrines invoked by the plurality opinions that blocked meaningful judicial review of Indiana’s statute – the doctrines of facial challenges and “discriminatory intent” – had no proper application in the case.

##### 1. Overlooked Facts

In 2005, Indiana enacted one of the nation’s most restrictive voter identification laws<sup>233</sup> on a straight-line party vote: it was supported by all Republicans in the state legislature and received support from no Democrats.<sup>234</sup> The law required voters to present government-issued identification at the polls.<sup>235</sup> Nearly one percent of Indiana’s population lacked such identification when the statute was passed,<sup>236</sup> most of whom were poor or older voters.<sup>237</sup>

The Supreme Court in *Crawford v. Marion County Election Board*<sup>238</sup> upheld a lower court’s dismissal of a challenge to the Indiana statute on a rationale that makes it very difficult to challenge voter identification laws before elections already have taken place. The six votes upholding the dismissal came in two plurality opinions, one by Justice Stevens (joined by the Chief Justice and Justice Kennedy), the other by Justice Scalia (and joined

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<sup>233</sup> See *Crawford v. Marion County Election Board*, 553 U.S. 181, 222 (2008) (Souter, J., dissenting).

<sup>234</sup> *Crawford*, 553 U.S. at 203 & n. 21 (providing vote tally); *id.* at 240 (Breyer, J., dissenting) (noting that Indiana’s law was the most restrictive in the country).

<sup>235</sup> See *id.* at 185-87.

<sup>236</sup> See *id.* at 188.

<sup>237</sup> See *id.* at 238 (Breyer, J., dissenting).

<sup>238</sup> 553 U.S. 181 (2008).

by Justices Thomas and Alito). But the only harm both opinions considered was whether the statute violated the “right to vote” under equal protection.<sup>239</sup> Neither the plurality (nor the dissenting opinions) considered whether the statute threatened a structural constitutional harm.

More specifically, no Justice asked whether the Indiana statute, and the circumstances surrounding its enactment, posed a threat to Legitimate-Selection. If that question had been asked, it would have been obvious that numerous facts mentioned in passing were of crucial legal significance. Consider the following. A conservative estimate was that more than forty thousand Indiana voters – about 1% of the state’s electorate -- lacked the requisite identification at the time the statute was enacted,<sup>240</sup> and most of these persons tended to vote democratic. Indiana was understood to be a swing state in national elections, and it was well understood that only a few hundred voters in another swing state had determined the nation’s President only five years earlier.<sup>241</sup> The Indiana law combated voter fraud in a highly partisan way: the statute targeted a form of fraud (in-person) thought to “favor” democrats, and left unaddressed a form of fraud (absentee-voting) thought to favor republicans, despite the fact that the only fraud that *had* been documented in Indiana was absentee-voting.<sup>242</sup> Finally, all Republicans in both houses of the Indiana legislature had supported the law, and all Democrats opposed it. Indeed, Justice Stevens’ plurality opinion – which *rejected* the lawsuit -- went so far as to observe that “[i]t is fair to infer that partisan considerations may have played a significant role in the decision to enact” Indiana’s law.<sup>243</sup> The three dissenting Justices agreed.<sup>244</sup>

None of the abovementioned facts evidencing partisanship, however, was legally relevant under Justices Stevens’ and Scalia’s opinions. This is not surprising. Legal tests are reductive, identifying as legally relevant only a small subset of the infinite facts that characterize a given circumstance. The abovementioned facts bear on the question of whether there has been structural harm to republican government, but do not readily fit into equal protection doctrine, which focuses instead on harm to individual voters. Thus Justice Stevens’ analysis was directed almost exclusively at considering the “voters who may experience a special burden under the statute,” ultimately rejecting petitioner’s challenge because the record did not show “excessively burdensome requirements on any class of voters.”<sup>245</sup> Likewise,

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<sup>239</sup> *Id.* at 1621 (Stevens, J.); *id.* at 1624 (Scalia, J., concurring).

<sup>240</sup> *Id.* at 218 (Souter, J., dissenting).

<sup>241</sup> I refer, of course, to Florida in the 2000 presidential election.

<sup>242</sup> *Crawford*, 553 U.S. at 195; *id.* at 225 (Souter, J., dissenting).

<sup>243</sup> *Id.* at 1624.

<sup>244</sup> See *id.* at 236 (Souter, J., dissenting) (noting that Indiana had enacted “one of the most restrictive photo identification requirements in the country . . . [w]ithout a shred of evidence that in-person voter impersonation is a problem in the State, much less a crisis”).

<sup>245</sup> *Crawford*, 553 U.S. at 200-203. The facts evidencing partisanship conceivably could have been relevant to another part of Justice Stevens’ equal protection

Justice Scalia's plurality opinion focused exclusively on the law's effects on voters.<sup>246</sup>

But from the vantage point of the structural principle of Republican Legitimacy, the above facts evidencing partisanship were crucially relevant. A known byproduct of stricter registration requirements is that fewer people to whom the requirements apply will vote. Republicans thought that the law's additional requirements would keep more Democrat-voting than Republican-voting voters from voting. And so did Democrats. A purposeful partisan-skewed reduction of the electorate violates the first component of political legitimacy, Legitimate-Selection. That Indiana's voter identification law *also* aimed to accomplish a legitimate anti-fraud goal should not provide cover for a legislature to differentially limit the electorate.<sup>247</sup>

To conclude, exclusive reliance on individual rights doctrines led the parties and Court to overlook the legal significance of many facts concerning the legitimacy of Indiana's electoral system. And this allows us to generalize an additional reason why Professor Charles is mistaken in claiming it does not matter whether a constitutional interest is denominated as individual or structural:<sup>248</sup> Legal rules are reductive by nature, and individual rights doctrines focus attention on individuals, not structure. Individual rights claim accordingly may allow structural harms to be neglected.

## 2. Inapplicable Sub-doctrines

Each plurality opinion in *Crawford* invoked a legal sub-doctrine that kept each plurality from applying heightened review. Republican Legitimacy

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analysis, the requirement that the Indiana law be "nondiscriminatory." *See id.* at 204. But Justice Stevens did not think the aforementioned partisanship facts relevant to the nondiscrimination inquiry, likely because he used discriminatory in the oddly narrow sense of meaning an "irrelevant" voting requirement. *See id.* at 189 (concluding that the poll taxes struck down in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1996), "invidiously discriminate[d]" because the taxes were "irrelevant to the voter's qualifications."). There is one other place in Justice Stevens' plurality where the abovementioned facts conceivably could have been relevant. *See infra* note 247.

<sup>246</sup> *See Crawford*, 553 U.S. at 204-09 (Scalia, J., plur. op) (discussing what criteria determine "the severity of the burden" that a law imposes on voters).

<sup>247</sup> Justice Stevens suggests Indiana's law would have been unconstitutional if "partisan considerations . . . had provided the *only* justification" for it. *Id.* at 203 (emphasis supplied). This is too cramped an understanding of the appropriate constitutional limitations. On Justice Stevens' view, all voter identification laws would pass muster under a facial challenge because all aim to accomplish at least one legitimate goal -- combating voter fraud. This short-changes Legitimate-Selection, for the reasons provided above in text. That there are legitimate policies behind a genus of election laws should not mean that all possible species of the election law are constitutional. I explain in a companion article what the Court should have done in *Crawford*. *See Rosen, supra* note 21, at 46 and ff.

<sup>248</sup> *See supra* Part II.D.2.

makes clear why neither sub-doctrine properly shielded Indiana's law from careful scrutiny. Both doctrines properly apply to rights-based claims, but were inapposite to the structural principle of Republican Legitimacy.

*a. The Overlooked As-Applied Challenge*

Justice Stevens' opinion assumed that the petitioners bore "a heavy burden of persuasion" because they advanced a facial challenge.<sup>249</sup> The Court has explicitly stated that "[f]acial challenges are disfavored,"<sup>250</sup> and it has deliberately designed the doctrine so that facial challenges are much more difficult to win than as-applied challenges. Facial challenges will prevail only if a "law is unconstitutional in all its applications," and "a facial challenge must fail where the statute has a plainly legitimate sweep."<sup>251</sup>

Justice Stevens was surely correct that petitioners' equal protection claims were facial challenges. After all, the election had not yet occurred, and so no Indiana voters had yet been kept from voting. "[C]onsider[ing] only the statute's broad application to all Indiana voters," Justice Stevens quickly concluded that the State's interests in countering fraud were "sufficient to defeat petitioners' facial challenge . . ."<sup>252</sup>

But exclusive focus on a rights claim led the Court and parties to overlook the as-applied challenge that also was present. Though an individual may not be harmed until she has been barred from voting, structural harm to the legitimacy of republican government can arise before election day. Voter registration laws bear on the structural principle of Legitimate-Selection, and such laws can affect the political activities of people and organizations before elections take place. Because laws that undermine Legitimate-Selection can have effects before elections, as-applied Republican Legitimacy challenges should be able to be brought *before* election day. Laws that allegedly seek to differentially disenfranchise on partisan grounds undermine the legitimacy of the electoral process before even a single elector has been wrongfully kept from voting, and hence can properly be subject to as-applied Republican Legitimacy challenges prior to election day.

This is important because, as explained above, facial challenges are exceedingly difficult to win.<sup>253</sup> Post-election lawsuits asserting as-applied rights claims are not adequate to protect the structural interest of Republican Legitimacy because judicial remedies are limited. For example, courts have only limited institutional capital to cast aside election results and order new elections.<sup>254</sup> Further, because legislatures make frequent modifications to

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<sup>249</sup> *Id.* at 200-01.

<sup>250</sup> *Washington State Grange v. Washington State Republican Party*, 522 U.S. 442, 450 (2008).

<sup>251</sup> *Id.* at 449 (internal quotations omitted).

<sup>252</sup> *Id.* at 202-03.

<sup>253</sup> See *supra* notes 250 and 251.

<sup>254</sup> Cf. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE*



their election laws, allowing only as-applied rights claims effectively insulates these laws from serious judicial review.

We now are in a position to appreciate another reason why Professor Charles is mistaken in arguing that it is irrelevant whether constitutional interests are denominated as individual or structural:<sup>255</sup> Rights-based claims can trigger sub-doctrines that are not applicable to structural claims. (The next subsection gives a second example of this).

*b. The Irrelevance of Discriminatory Intent*

Republican Legitimacy explains why the doctrinal obstacle to strict judicial review identified in Justice Scalia's plurality opinion – the absence of a showing of intentional discrimination by the Indiana legislature – should not have barred the Court from subjecting Indiana's statute to heightened scrutiny.

Justice Scalia's plurality opinion, which was joined by Justices Thomas and Alito, cited to *Washington v. Davis*<sup>256</sup> and asserted that petitioners' claim failed because they could not show that the Indiana legislature had a discriminatory intent:

[W]eighing the burden of a nondiscriminatory voting law upon each voter and concomitantly requiring exceptions for vulnerable voters would effectively turn back decades of equal –protection jurisprudence. A voter complaining about such a law's effect on him has no valid equal-protection claim because, without proof of discriminatory intent, a generally applicable law with disparate impact is not unconstitutional. The Fourteenth Amendment does not regard neutral laws as invidious ones, even when their burdens purportedly fall disproportionately on a protected class. *A fortiori* it does not do so when, as here, the classes complaining of disparate impact are not even protected.<sup>257</sup>

A discriminatory intent may be sensible vis-à-vis individual rights, but it has no place vis-à-vis structural constitutional principles. An equal protection doctrine without a discriminatory impact requirement may subject too many legitimate laws to heightened scrutiny, thereby striking down too many laws, as a result of what might be called 'judicial myopia.' There are political losers in virtually every legislative battle, and this fact of politics ordinarily is not constitutionally problematic. Without a discriminatory intent requirement, such "non-problematic" political losers can get courts to focus on *their* loss -- without giving adequate attention to the statute's overall benefits which, as almost always occurs in politics, comes at the expense of *someone* -- and to subject the legislation to a heightened scrutiny that seldom

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LAW OF DEMOCRACY: LEGAL STRUCTURES OF THE POLITICAL PROCESS 967 (3<sup>rd</sup> ed. 2007)(noting that the "drastic remedy" of setting aside elections is "quite rare").

<sup>255</sup> See *supra* Part II.D.2.

<sup>256</sup> 426 U.S. 229, 248 (1976).

<sup>257</sup> 128 S. Ct. at 1626 (Scalia, J., concurring) (emphasis in original).

can be satisfied when “mere politics” is the real reason for their loss. A discriminatory intent requirement is a plausible doctrinal mechanism for correcting such “judicial myopia.”

Critically, the risk of judicial myopia does not extend to structural constitutional principles. If a statute imposes a structural constitutional harm, that is a sufficient and legitimate basis for triggering heightened judicial review because there is no larger context that conceivably could justify the legislation. Accordingly, a structural harm appropriately triggers heightened judicial scrutiny. And this explains why structural constitutional principles do not contain discriminatory intent requirements. For instance, separation of powers doctrine considers the aggregate effects of a statute on (let’s say) the President’s powers, never inquiring whether Congress *intended* to encroach on presidential power.<sup>258</sup> This is true of both (so-called) formalist and functionalist separation-of-powers doctrines.<sup>259</sup> The Court’s federalism jurisprudence likewise did not include an intentionality requirement in the days when it judicially enforced the Tenth Amendment.<sup>260</sup> Nor is there any such intentionality requirement under the Court’s quasi-Tenth Amendment anti-commandeering jurisprudence.<sup>261</sup>

That discriminatory intent has no proper application to structural constitutional principles is yet another reason why individual rights doctrines cannot adequately guard structural values.<sup>262</sup> Discriminatory intent is exceedingly difficult to establish. Beyond the “many minds” puzzle of which legislators’ intent should matter for purposes of establishing discriminatory intent, legislators tend to have multiple motivations when they vote, and nowadays are sufficiently sophisticated to avoid publicly revealing nefarious intents. Further, state legislatures – the institutions that create most of the rules-of-the-road -- typically do not publish formal legislative histories that reveal *any* legislative intent. For all these reasons, discriminatory intent is hard to show, and doctrines that require it risk under-enforcing the constitutional principle they implement.<sup>263</sup>

As applied to the Indiana law, the upshot is the following: showing that the Indiana legislature discriminatorily intended to undermine the legitimacy of the electoral process was not a prerequisite of heightened

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<sup>258</sup> See, e.g., *Clinton v. Jones*, 520 U.S. 681 (1997) (legal test is whether allowing lawsuit against sitting president “will curtail the scope of the official powers of the Executive Branch;” no discriminatory intent requirement).

<sup>259</sup> The *Clinton* case referenced immediately above adopted a “functionalist” approach. For an example of a “formalist” approach, which likewise did not include a discriminatory intent requirement, see *Clinton v. City of New York*, 524 U.S. 417 (1998).

<sup>260</sup> See *National League of Cities v. Usery*, 426 U.S. 833, 842-48 (1976).

<sup>261</sup> See *New York v. United States*, 505 U.S. 144 (1995), and *United States v. Printz*, 521 U.S. 898 (1997).

<sup>262</sup> *Pace* Professor Charles, once again. See *supra* Part II.D.2.

<sup>263</sup> See generally LAWRENCE G. SAGER, *JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE* 84-128.

scrutiny.<sup>264</sup> Reliance on individual rights left the structural constitutional interest vulnerable because discriminatory requirements, which are very difficult to satisfy, are not applicable to structural constitutional claims.

### B. *Vieth and Political Gerrymandering*

Five Justices dismissed a political gerrymandering claim as non-justiciable in *Vieth v. Jubelirer*.<sup>265</sup> Joined by three other Justices, Justice Scalia's plurality opinion decided that all political gerrymandering claims were non-justiciable political questions because there was no judicially manageable standard. In his view, "the mere fact that the[] four dissenters come up with three different standards – all of them different from the two proposed by [the earlier case of] *Bandemer* and the one proposed here by appellants – goes a long way to establishing that there is no constitutionally discernible standard."<sup>266</sup> Justice Kennedy's concurrence, which provided the crucial fifth vote, dismissed the claim but did not categorically shut the door on political gerrymandering claims.<sup>267</sup>

Republican Legitimacy sheds important light on *Vieth* in two respects. First, it provides a conceptual framework that facilitates identification of overlooked common ground between Justice Kennedy and the four dissenters. The conceptual and doctrinal clarity provided by Republican Legitimacy conceivably could have led to a different outcome in *Vieth*: a five Justice opinion permitting Republican Legitimacy claims against partisan gerrymanders.<sup>268</sup>

Second, awareness of Republican Legitimacy facilitates recognition of the inadequacies of the individual-rights based approach taken in *Vieth*. The multiple proposed legal tests do not mean there are no "discernible standards" to govern political gerrymandering claims as Justice Scalia claimed, but reflect the folly of shoehorning challenges to political gerrymandering into an individual rights-claim instead of placing them into the structural constitutional claim in which they properly fit. Republican Legitimacy hence shows that Justice Scalia mistook a failure to agree on account of conceptual confusion for the impossibility of agreement.

#### 1. Overlooked Common Ground

The sole constitutional ground asserted by the petitioners before the Supreme Court was that Pennsylvania's redistricting plan violated the Equal Protection Clause.<sup>269</sup> This exclusively individual-rights focused approach

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<sup>264</sup> A companion article considers precisely what scrutiny should have been applied to Indiana's law and other Republican Legitimacy claims. See Rosen, *supra* note 21, at 32.

<sup>265</sup> 541 U.S. 267 (2004).

<sup>266</sup> *Id.* at 292 (Scalia, J., plurality op.).

<sup>267</sup> *Id.* at 309-14 (Kennedy, J., concurring).

<sup>268</sup> See *supra* note 264.

<sup>269</sup> See *id.* 294 (noting that "[o]nly an equal protection claim is before us in the

distorted the way the Justices viewed the case because it left the Justices without a doctrinal and conceptual basis to ground the structural harms that five of the Justices had noted. Consequently, some Justices merely made passing comments about partisan gerrymandering's structural harms, while others attempted to shoehorn the structural harms (which in fact are aspects of Republican Legitimacy) into individual rights doctrine. Republican Legitimacy provides a coherent framework within which these harms could have been housed.

First consider Justice Stevens' dissent. He thought partisan gerrymandering ran afoul of Equal Protection, but his conception of the constitutional harm was structural, not rights-based. Gerrymanders "effect a constitutional wrong when they disrupt the representational norms that ordinarily tether elected officials to their constituencies as a whole."<sup>270</sup> They generate a "disruption of the representative process," which imposes a "representational harm."<sup>271</sup> Justice Stevens is describing harms to both components of Republican Legitimacy: gerrymanders distort Legitimate-Selection and undermine Legitimate-Decisionmaking.

To be sure, Justice Stevens labored to tie these structural harms to individuals so as to fit them into Equal Protection doctrine.<sup>272</sup> This is conceptually misbegotten insofar as it focuses attention away from the primary harm and instead onto its secondary consequences. And doing this had significant doctrinal costs because, as shown above, sub-doctrines applicable to individual rights-based doctrines frequently are irrelevant to structural principles.<sup>273</sup> More specifically, Justice Stevens' individual rights analysis triggered an equal protection sub-doctrine that shielded the claim from heightened judicial review, as Justice Scalia convincingly showed.<sup>274</sup> That sub-doctrine would have had no application, however, to a structural constitutional claim grounded in Republican Legitimacy.<sup>275</sup>

Even more clearly than Justice Stevens, Justice Breyer's concurrence conceptualized the harm of partisan gerrymandering structurally. Unconstitutional gerrymandering occurs when the district-drawing "fail[s] to advance any plausible democratic objective while simultaneously threatening serious democratic harm."<sup>276</sup> Breyer found "constitutionally mandated

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present case") (Scalia, J., plurality op.).

<sup>270</sup> *Id.* at 329 (Stevens, J., dissenting) (emphasis supplied).

<sup>271</sup> *Id.* at 330 (Stevens, J., dissenting).

<sup>272</sup> *See id.* at 323-33.

<sup>273</sup> *See supra* Part IV.A.2.

<sup>274</sup> Justice Stevens analogized political gerrymandering to racial gerrymandering. As Justice Scalia pointed out, however, the level of scrutiny under Equal Protection turns on the identity of the harmed group, and while race triggers heightened scrutiny, political affiliation does not. *See id.* at 293-94 (plurality op.).

<sup>275</sup> The level of review appropriate to a structural claim does not turn on whether there has been harm to individuals who fall into a suspect class for equal protection purposes. *See Rosen, supra* note 21.

<sup>276</sup> *Id.* (Breyer, J., dissenting) (emphasis supplied).

democratic requirements”<sup>277</sup> to be grounded in the Constitution’s opening words.<sup>278</sup> The contents of these constitutional “democratic requirements” are part of Legitimate-Selection: prohibited is “the unjustified use of political factors to entrench a minority in power.”<sup>279</sup> Entrenchment is a “democratic harm” that “dishonor[s] . . . democratic values” because “voters find it far more difficult to remove those responsible for a government they do not want.”<sup>280</sup>

To be sure, Justice Breyer ultimately grounded the constitutional harm of partisan gerrymandering in equal protection.<sup>281</sup> This is unsurprising in view of the fact that equal protection was the only claim petitioners had asserted. But Breyer’s structural conception of gerrymandering’s harm suggests he may have been amenable to the principle of Republican Legitimacy.

Justice Kennedy, whose concurrence provided the critical fifth vote for Justice Scalia’s plurality opinion, plausibly could have provided an additional vote for Republican Legitimacy. Justice Kennedy criticized the appellants’ exclusive reliance on equal protection and suggested that an alternative constitutional principle – free speech -- may have been more suitable to their challenge.<sup>282</sup> Openness to an alternative to equal protection suggests Kennedy might have been open to other grounds as well.

Further, Justice Kennedy wrote of gerrymandering’s impact on “rights of fair and effective representation.”<sup>283</sup> Kennedy also explicitly framed the free speech challenge he proposed in structural terms, tying his proposed legal test to the structural rationale that “[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views.”<sup>284</sup> Finally, and most tellingly, Justice Kennedy closed his concurrence as follows:

The *ordered working of our Republic, and of the democratic process, depends on a sense of decorum and restraint in all branches of government* . . . Here, one has the sense that legislative restraint was abandoned. That should not be thought to serve the *interests of our*

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<sup>277</sup> *Id.* at 356 (emphasis supplied).

<sup>278</sup> *Id.* (“‘We the People,’ who ‘ordain[ed] and establish[ed] the American Constitution,’ sought to create and to protect a workable form of government that is in its ‘principles, structure, and whole mass’ basically democratic.”)(internal quotations eliminated).

<sup>279</sup> *Id.* at 360 (Breyer, J., dissenting).

<sup>280</sup> *Id.* at 361 (Breyer, J., dissenting); see also *id.* at 367 (referring to the “risk of harm to basic democratic principles”) (Breyer, J., dissenting).

<sup>281</sup> See *id.* at 355 (Breyer, J., dissenting).

<sup>282</sup> *Id.* at 314 (Kennedy, J., concurring).

<sup>283</sup> *Id.* at 312.

<sup>284</sup> *Id.* (quoting *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000)).

*political order*.<sup>285</sup>

This likely is Justice Kennedy's view as to what was the most salient harm, and it is structural in character: trauma to the conditions necessary to sustain the "ordered working of our Republic," the "democratic process," and "our political order."<sup>286</sup> And these are part of Legitimate-Selection.

Justice Kennedy ultimately concurred because of the "failings of the many proposed standards for measuring the burden a gerrymander imposes on representation rights,"<sup>287</sup> but thought the Court "should be prepared to order relief" if workable standards emerge in the future.<sup>288</sup> Might he have joined an opinion that asked a lower court to take account of the structural harms that he himself observed? The fairest answer, I would think, is an enthusiastic "perhaps." The answer quite likely turns on whether such a harm could be protected by a judicially manageable legal standard. A companion Article argues that it can.<sup>289</sup>

Justice Souter's dissenting opinion (joined by Justice Ginsburg) made passing reference to gerrymandering's structural consequences, noting that "the increasing efficiency of partisan redistricting has damaged the democratic process to a degree that our predecessors only began to imagine."<sup>290</sup> The thrust of Justice Souter's opinion, however, was that gerrymandering harmed individual voters.<sup>291</sup> But this does not mean that Justices Souter and Ginsburg would have been unwilling to join an opinion that forthrightly understood partisan gerrymandering as (also) imposing a structural constitutional harm. Is it farfetched to suggest they may have joined an opinion signed by Justices Stevens, Breyer, and Kennedy that analyzed partisan gerrymandering under the structural principle of Republican Legitimacy?

## 2. Mistaking a Failure to Agree for the Impossibility of Agreement

Republican Legitimacy facilitates recognition of a flaw in Justice Scalia's main argument. Scalia wrote "the mere fact that these four dissenters come up with three different standards . . . goes a long way to establishing

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<sup>285</sup> *Id.* at 316-17 (Kennedy, J., concurring) (emphasis supplied).

<sup>286</sup> *Id.*

<sup>287</sup> *Id.* at 317.

<sup>288</sup> *Id.*

<sup>289</sup> See Rosen, *Implementing Republican Legitimacy*, *supra* note 21.

<sup>290</sup> *Id.* at 345 (Souter, J., dissenting); cf. *id.* at 343 (gerrymandering interferes with the "right to 'fair and effective representation'" (internal quotation omitted) (Souter, J., dissenting).

<sup>291</sup> See *id.* at 343 (Souter, J., dissenting) ("The Constitution guarantees both formal and substantial *equality among voters*") (emphasis supplied); (describing gerrymandering as denying "each political group in a State [of] the same chance to elect representatives of its choice as any other political group").

that there is no constitutionally discernible standard.”<sup>292</sup> This is an unfair conclusion because although all dissenters invoked the same terminology of “equal protection,” they had fundamentally different understandings of partisan gerrymandering’s harm. Justices Stevens and Breyer conceptualized the harm structurally, whereas Justices Souter and Ginsburg conceptualized individual-based harms. The Justices’ different judicial standards are a natural byproduct of their different conceptions of the constitutional harm, but do not indicate that a single conception could not be addressed by a manageable standard. It is possible that the conceptual clarity afforded by Republican Legitimacy could have led to agreement among the Justices. The Justices’ lack of conceptual clarity in *Vieth* does not mean that agreement is impossible once clarity is obtained, *pave* Justice Scalia.

### C. Revisiting Citizens United

Republican Legitimacy has important implications for *Citizens United v. Federal Election Commission*,<sup>293</sup> the controversial decision striking down the Bipartisan Campaign Reform Act of 2002’s (the “BCRA”) prohibition on corporations and unions from using general treasury funds to make independent expenditures for “electioneering communication” or the express advocacy of the election or defeat of a candidate.<sup>294</sup> Republican Legitimacy illuminates *Citizens United* in two respects. First, as Part IV.C.1 explains, Republican Legitimacy clarifies the nature and significance of the governmental interest behind the expenditures prohibition, showing there was a compelling governmental interest. Second, Republican Legitimacy shows that deciding whether corporate and union expenditures should be banned implicated a conflict between two competing constitutional considerations: free speech and Republican Legitimacy. Congress’ considered resolution of this constitutional conflict was entitled to substantial judicial deference.

#### 1. Recognizing a Compelling Governmental Interest

First, Republican Legitimacy clarifies the governmental interest behind the campaign finance regulation. This is doctrinally critical because all Justices accepted that constitutionally protected speech can be regulated when there is a compelling governmental interest and the regulation is narrowly tailored.<sup>295</sup> Among the core disputes in the case was whether the BCRA’s provision was supported by a compelling governmental interest.

The Justices believed that the crucial question was whether BCRA’s ban was designed to prevent “corruption,” or the appearance thereof, of the electoral process. “Corruption” assumed this central role because the earlier case of *Buckley v. Valeo* held that preventing corruption or its appearance

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<sup>292</sup> *Id.* at 292.

<sup>293</sup> 130 S. Ct. 876 (2010).

<sup>294</sup> *See id.* at 887.

<sup>295</sup> *See id.* at 898.

was “sufficiently important” to justify campaign finance limits.<sup>296</sup> Of course, the fact that corruption was sufficiently important does not mean that *only* corruption is sufficiently important to justify regulation. But instead of considering whether there were other sufficiently important governmental interests, the lawyers defending BCRA and the Justices tried to shoehorn all governmental interests into the one surefire sufficiently important interest, corruption. This was unfortunate because, as I explain below, Republican Legitimacy is a far superior framework for analyzing the BCRA.

*a. The Justices’ Understandings of Corruption*

To recognize Republican Legitimacy’s superiority to corruption, it first is necessary to understand how ‘corruption’ operated in the *Citizens United* opinions. Justice Kennedy’s majority opinion held that corruption extended only to “*quid pro quo* corruption,” *i.e.*, the direct exchange of “dollars for political favors.”<sup>297</sup> The majority concluded that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption,”<sup>298</sup> and that BCRA’s ban accordingly did not satisfy strict scrutiny.

Justice Stevens’ dissent adopted a broader definition of corruption. Drawing on prior cases, Justice Stevens identified nearly a half dozen ways that union and corporate expenditures could lead to “corruption:” unregulated expenditures could (1) give corporations “unfair influence in the electoral process;” (2) “distort public debate in ways that undermine rather than advance the interests of listeners . . . [by] drowning out [] non-corporate voices;” (3) “generate the impression that corporations dominate our democracy,” which could lead citizens to “lose faith in their capacity, as citizens, to influence public policy,” to “cynicism and disenchantment,” and ultimately to “a reduced ‘willingness of voters to take part in democratic governance;” (4) possibly “chill the speech” of elected officials, “who fear that a certain corporation can make or break their reelection chances;” and (5) “open the door to ‘rent seeking that is far more destructive’ than what noncorporations are capable of” due to corporation’ lower collective action costs vis-à-vis individuals.<sup>299</sup>

*b. The Superiority of “Republican Legitimacy”*

Republican Legitimacy is a superior framework to “anti-corruption” for four reasons. First, Republican Legitimacy provides a more conceptually coherent framework that explains how the welter of policies discussed in Justice Stevens’ dissent were all parts of a single integrated principle. Second, Republican Legitimacy points to other lines of caselaw that supported the

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<sup>296</sup> 424 U.S. 1, 25 (1976).

<sup>297</sup> *Citizens United*, 130 S. Ct. at 909-10.

<sup>298</sup> *Id.* at 909.

<sup>299</sup> *Id.* at 974-76 (Stevens, J., dissenting).



dissent's position. Third, the understanding that BCRA's goal was to secure Republican Legitimacy, rather than to address corruption, sheds a spotlight on two extraordinary logical gaps in the majority's reasoning. Finally, Republican Legitimacy provides a principled basis for concluding that the BCRA was supported by a compelling governmental interest.

#### i. Conceptual Clarity

Consider first the many forms of "corruption" Justice Stevens identifies in his dissent. As presented in his opinion, they can seem like a disjointed laundry-list. Indeed, it is not without cause that Professor Hasen has written that although Stevens' analysis contains "many provocative and important ideas," it "as a whole . . . does not cohere."<sup>300</sup>

While Stevens' arguments may not "cohere" under an anti-corruption rationale,<sup>301</sup> this does not mean that they *cannot* cohere. The coherence problem lies not with Stevens' justifications, but with the organizing rubric of anti-corruption. Republican Legitimacy, by contrast, perfectly captures the potential harms Stevens identified. The apparently disparate list of dangers fall into two categories that by now should be familiar: threats to (1) Legitimate-Selection (rationales 1-3) and (2) Legitimate-Decisionmaking (rationales 4-5).

To see that Justice Stevens was speaking more about Republican Legitimacy than corruption, consider his response to Justice Kennedy's argument that corruption extends only to quid-pro-quo exchanges. Justice Stevens wrote that "[t]here are threats of corruption that are far more destructive to a democratic society than the odd bribe."<sup>302</sup> Stevens' explanation is more naturally and compellingly conceptualized as addressing the governmental interest in guarding Republican Legitimacy. Stevens spoke of the danger that "private interests are seen to exert outsized control over officeholders solely on account of the money spent on (or withheld from) their campaigns . . ."<sup>303</sup> Instead, officeholders must "decide issues . . . on the merits or the desires of their constituencies, . . . not according to the wishes of those who have made large financial contributions – or expenditures – valued by the officeholder."<sup>304</sup> Justice Stevens called this the concern that some non-constituents will have an "undue influence," or "improper influence,[]" on officeholders' decisionmaking.<sup>305</sup> Furthermore, he wrote,

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<sup>300</sup> Richard L. Hasen, *Citizens United and the Orphaned Antidistortion Rationale*, 27 GA. ST. U. L. REV. 989, 999 (2011).

<sup>301</sup> While Professor Hasen argued that Justice Stevens' explanations did not amount to a coherent anti-distortion rationale, Justice Stevens himself equated anti-corruption with antidistortion, *See Citizens United*, 130 S. Ct. at 970-71 (Stevens, J., dissenting).

<sup>302</sup> *Id.* at 962-63 (Stevens, J., dissenting).

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* (quoting from McConnell, 540 U.S. at 153).

<sup>305</sup> *Id.* at 962-63 & nn. 63-65.

[t]here should be nothing controversial about the proposition that the influence being targeted is ‘undue.’ In a democracy, officeholders should not make public decisions with the aim of placating a financial benefactor, except to the extent that the benefactor is seen as representative of a larger constituency or its arguments are seen as especially persuasive.<sup>306</sup>

In short, though Justice Stevens used the terminology of “corruption,” he actually was drawing on a theory of what constitutes illegitimate decisionmaking by elected representatives, *i.e.*, Legitimate-Decisionmaking.<sup>307</sup>

Framing Justice Stevens’ argument as the claim that BCRA aimed to secure Legitimate-Decisionmaking significantly strengthens the argument. In addition to revealing the conceptual unity behind what at first appears to be disparate policies, Republican Legitimacy provides a principled reason to conclude that BCRA was supported by a compelling governmental interest. BCRA targeted what Congress believed to be improper influences on legislators’ decisionmaking: Congress thought corporate and union expenditures posed a particularly acute risk that legislators would support policies for reasons of illegitimate self-interest. Because maintaining Republican Legitimacy constitutes a constitutional interest, governmental policies that target threats to Republican Legitimacy satisfy the compelling governmental interest test.<sup>308</sup>

Further, grounding Stevens’ argument in Republican Legitimacy invokes the case law and theoretical considerations examined earlier that explain the need for, and contents of, Legitimate-Decisionmaking.<sup>309</sup> Government officials must act impartially in the public interest, and “self-interested behavior by government officials”<sup>310</sup> can be unconstitutional without rising to the level of “corrupt.” Consider in this regard the “conflict-of-interest recusal rule[s]” in Congress and “virtually every State” that were canvassed (and upheld) in *Nevada Commission on Ethics v. Carrigan*.<sup>311</sup> The criteria for recusal – when a legislator “is immediately and particularly

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<sup>306</sup> *Id.* at n. 63.

<sup>307</sup> Consider, as well, Justice Stevens’ executive summary of the BCRA’s goal: to “safeguard the integrity, competitiveness, and democratic responsiveness of the electoral process.” *Citizens United*, 130 S.Ct. at 974-76 (Stevens, J., dissenting). This is conceptually connected to Republican Legitimacy, not to anti-corruption.

<sup>308</sup> The analysis above in text does not mean that all expenditure restrictions would be constitutional. Regulations still would have to satisfy the narrowly tailored standard, meaning that restrictions that selectively disadvantaged a political party or ideology would be unconstitutional.

<sup>309</sup> See *supra* Part II.B.2.

<sup>310</sup> See VERMEULE, *supra* note 49, at 4-5.

<sup>311</sup> 131 S. Ct. 2343, 2348-49 (2011). Though *Carrigan* was decided after *Citizens United*, legislative anti-recusal rules date back to a week after the First Congress convened, See *id.* at 2348. “[T]he long-recognized need for legislative recusal” is itself powerful evidence of the need’s legitimacy. *Id.* at 2347-48. And as explained above in text, the need for such recusal rules is grounded in Legitimacy-Decisionmaking.

interested or a judge has “personal bias or prejudice” – are triggered by circumstances that fall short of “corruption.” This is so because the recusal criteria are not aimed at corruption, but at maintaining the legitimacy and dignity of government.<sup>312</sup>

In short, like the recusal rules at issue in *Carrigan*, BCRA was an instance of the legislature policing itself. The *Carrigan* Court was substantially deferential to legislative self-policing,<sup>313</sup> even when it trenched on legislators’ political advocacy; the *Carrigan* majority upheld not only Nevada’s voting ban, but also rules that “forbid [the legislator] to ‘advocate the passage or failure’ of the proposal – evidently meaning advocating its passage or failure during the legislative debate.”<sup>314</sup> The *Citizens United* Court likewise should have been more deferential to Congress’ self-policing in BCRA.

## ii. Gaps in the Majority’s Logic

Republican Legitimacy sheds light on a logical flaw in Justice Kennedy’s decision for the majority. Consider Justice Kennedy’s argument as to why preventing quid-pro-exchanges of “dollars for political favors” is the only anti-corruption interest that constitutes a compelling governmental interest.<sup>315</sup> Kennedy stated that even though corporate and union expenditures may be intended by their donors to secure influence over legislators, “favoritism and influence are not avoidable in representative politics.”<sup>316</sup> Not only can they not be avoided, but they are *desirable* in Kennedy’s view:

It is in the nature of an elected representative to favor certain policies, and, by necessary corollary, to favor the voters and contributors who support those policies. It is well understood that a substantial and legitimate reason, if not the only reason, to cast a vote for, or to make a contribution to, one candidate over another is that the candidate will respond by producing those political outcomes the supporter favors. Democracy is premised on responsiveness.

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<sup>312</sup> The Senate’s recusal rules, adopted when Thomas Jefferson was President of the Senate, explain that not having such rules would be “so contrary not only to the laws of decency, but to the fundamental principles of the social compact, which denies to any man to be a judge in his own case,” and goes on to say that “it is for the honor of the house that this rule, of immemorial observance, should be strictly adhered to.” *Carrigan*, 131 S. Ct. at 2348, quoting PARLIAMENTARY PRACTICE, *supra* note 164, at 31.

<sup>313</sup> To be sure, under the *Carrigan* majority’s analysis, the Court was not being deferential to legislative self-policing because the recusal rules did not affect constitutionally protected speech. I criticized this reasoning, and explained above why the recusal statutes indeed regulated constitutionally protected speech, but did so in a permissible fashion. *See supra* note 167.

<sup>314</sup> *Carrigan*, 131 S. Ct. at 2347.

<sup>315</sup> *Citizens United*, 130 S. Ct. at 909-10.

<sup>316</sup> *Id.*

In short, “favoritism and influence” are the other side of the coin of representatives’ responsiveness to constituents’ preferences -- and responsiveness is a normative *good* in a representative democracy.

When examined through the lens of “anti-corruption,” Justice Kennedy’s position may seem plausible. After all, do the activities listed in Justice Stevens’ dissent really constitute *corruption*? Is it corrupt for corporations to aim to influence who gets elected and how their representatives vote, and if corporations can spend more money than individuals to influence elections? Is it corrupt for a legislator to be influenced by the donations of his contributors? Given the amorphousness of corruption, and its usual requirement of bad intent,<sup>317</sup> there is plausibility to Justice Kennedy’s conclusion that these phenomena do not constitute “corruption.”

Kennedy’s argument looks very different, however, through the lens of Republican Legitimacy. As explained above, Justice Stevens’ position is best understood as the claim that BCRA guarded Legitimate-Decisionmaking. Thusly understood, Justice Kennedy’s argument was a *non-sequitur*.<sup>318</sup> Justice Kennedy’s truism – that at an officeholder invariably favors one policy (and hence voter preference) over another policy (and voter preference) – is irrelevant to whether a class of illegitimate legislative motivations exists. Similarly, that representatives should be responsive to their constituents’ preferences does not mean that there does not exist a category of “illegitimate” or “undue” constituent influence, as Justice Stevens claimed. For these reasons, Justice Kennedy’s position does not respond at all to the best understanding of Justice Stevens’ argument.

## 2. Recognizing a Constitutional Conflict

Republican Legitimacy could have had another important implication for the BCRA. Republican Legitimacy makes clear that the BCRA implicated two competing constitutional principles: speech and Republican Legitimacy.<sup>319</sup> Justice Kennedy’s opinion for the majority did not analyze BCRA this way: it viewed BCRA as an inexplicable disregard of one constitutional commitment (speech),<sup>320</sup> not as a resolution of a difficult

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<sup>317</sup> See Teachout, *supra* note 9, at 382 (arguing that bad intent is the “centerpiece” of political corruption).

<sup>318</sup> While the idea of illegitimate legislative motivations may be missed under a “corruption” rubric, this idea stands front-and-center of Republican Legitimacy’s concern with Legitimate-Decisionmaking.

<sup>319</sup> While BCRA admittedly limited speech, it also advanced Republican Legitimacy. Striking the ban arguably came at the expense of the constitutional value of Republican Legitimacy.

<sup>320</sup> See *Citizens United*, 130 S.Ct. at 898 (“political speech must prevail against laws that would suppress it”). Though Justice Stevens at one point referred to the necessity of “balanc[ing] competing constitutional concerns,” *id.* at 969 (Stevens, J., dissenting), he was referring to the competing First Amendment interests of the

constitutional conflict. Of course Congress hadn't actually realized this since it had not recognized Republican Legitimacy to be a constitutional principle. But if Congress *had* – if the BCRA were the considered judgments of Congress and the President as to how competing constitutional principles should be harmonized – then their judgment should have received significant judicial deference.<sup>321</sup>

There are two reasons such deference would have been appropriate. First, there is no objective way to reconcile competing incommensurable constitutional commitments.<sup>322</sup> Greater weight must be given to one, and deciding the extent to which one prevails over the other is an unavoidably subjective judgment.<sup>323</sup> The political branches are better suited than courts to harmonizing incommensurable constitutional commitments on basic democratic grounds due to harmonization's inescapable subjectivity.<sup>324</sup> In

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speaker (corporations and unions) and the public, not to conflicts among distinct constitutional principles. See *id.*

<sup>321</sup> Courts and scholars have given surprisingly little attention to conflicts between constitutional principles. Justice Breyer has come closest. When analyzing a campaign finance limitation in one pre-*Citizens United* case, Breyer proposed a deferential standard of review “where constitutionally protected interests lie on both sides of the legal equation.” *Nixon*, 528 U.S. at 400 (Breyer, J., concurring) (emphasis supplied). But the “competing *constitutionally protected interests*” of which Breyer spoke, *id.* at 402 (emphasis supplied), is not the same as two competing constitutional principles. Indeed, the cases he cited concerned non-constitutional governmental interests sufficiently important to justify the regulation of speech, see *id.* (citing *Frisby v. Schultz*, 487 U.S. 474, 484 (1988), which held that a person’s “well-being, tranquility, and privacy of the home” is a “significant government interest”) and circumstances where two parties had competing speech interests, see *Nixon*, 528 U.S. at 403 (citing numerous such cases).

Two recent books, which focus primarily on human rights law and the European Court of Human Rights, address the related issue of how conflicting *rights* should be adjudicated. See GEORGE C. CHRISTIE, *PHILOSOPHER KINGS? THE ADJUDICATION OF CONFLICTING HUMAN RIGHTS AND SOCIAL VALUES* (2011); LORENZO ZUCCA, *CONSTITUTIONAL DILEMMAS* (2007). Though BCRA concerns the different issue of a conflict between a constitutional right and a structural constitutional principle, many of Professor Christie’s ideas are nevertheless applicable. A work-in-progress of mine provides a comprehensive treatment to conflicts among constitutional principles.

<sup>322</sup> That is to say, the two principles cannot be reduced to a common metric that would then allow for an objectively correct decision to harmonize the conflict by choosing the principle with the highest value. See generally CHRISTIE, *supra* note 321, at 168 (providing a clear discussion of the incommensurability of constitutional values). In theory, the statement above in text is not true for an originalist if originalist sources considered and definitively resolved the conflict. In practice, originalist sources seldom if ever do so.

<sup>323</sup> See, e.g., CHRISTIE, *supra* note 321, at 167 (concluding that when human rights conflict, judges “are in fact choosing between values”).

<sup>324</sup> See Mark D. Rosen, *Why The Defense of Marriage Act Is Not (Yet?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors That*

fact, the same reasons that democracies place primary responsibility in legislatures to harmonize incommensurable *non-constitutional* public policies suggest that legislatures also should be primarily responsible for reconciling competing *constitutional* commitments.

Second, legislatures frequently have greater institutional expertise than courts in ferreting out and understanding the empirical judgments that are relevant to reconciling competing constitutional principles. This unquestionably is the case with election regulation. Justice Breyer is right that “the legislature understands the problem – the threat to electoral integrity, the need for democratization – better than [courts] do” and that the court accordingly should “defer to [Congress] political judgment that unlimited spending threatens the integrity of the electoral process.”<sup>325</sup> So was Justice White’s dissent in *Buckley*, where he observed that “Congress was plainly of the view that these expenditures also have corruptive potential; but the Court strikes down the provision, strangely enough claiming more insight as to what may improperly influence candidates than is possessed by . . . many seasoned professionals who have been deeply involved in elective processes and who have viewed them at close range over many years.”<sup>326</sup>

For these reasons, courts should give significant deference to the political branches’ considered judgments as to how competing constitutional commitments should be harmonized. The judicial role should be to “ask[] whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others . . .”<sup>327</sup> Congress’ judgment should be judicially overridden only when there may be failures in the political process that undermine faith in the political branches’ decisions.<sup>328</sup> The usual circumstances that lead to judicial suspicion of the political processes – such as the presence of discrete and insular minorities<sup>329</sup> – are absent from the instant context of campaign finance. The one concern is whether the congressional judgment was a form of self-dealing that harmed unrepresented outsiders<sup>330</sup> – people not currently in the legislature who might want to run for election in the future. The most important question for determining the appropriate level of judicial deference is whether a campaign finance enactment had the intention, or effect, of protecting incumbents by making it more difficult for challengers.<sup>331</sup>

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*Determine What the Constitution Requires*, 90 MINN. L. REV. 915, 967-70 (2006).

<sup>325</sup> *Nixon*, 528 U.S. at 402 (Breyer, J., concurring) (emphasis supplied).

<sup>326</sup> *Buckley v. Valeo*, 424 U.S. 1, 260-61 (1976) (White, J., concurring in part and dissenting in part).

<sup>327</sup> *See Nixon*, 528 U.S. at 402 (Breyer, J., concurring); *but see supra* note 321 (discussing the limitations of Breyer’s approach in *Nixon*).

<sup>328</sup> *Id.* at 402-03; *cf.* ELY, *supra* note 328, at 73-180 (arguing that the judiciary’s interference with ordinary majoritarian politics is appropriate where there are failures in the democratic process).

<sup>329</sup> *See United States v. Carolene Products, Co.*, 304 U.S. 144, 152-53 n. 4 (1938).

<sup>330</sup> ELY, *supra* note 328, at 83-88.

<sup>331</sup> *Cf. Randall v. Sorell*, 548 U.S. 230 (2006), discussed *supra* Part III.C.2(a).

Challengers, after all, are generally less known to the public than incumbents, and challengers accordingly might be more harmed than incumbents by fundraising restrictions.<sup>332</sup>

If Congress enacted BCRA for the purpose of protecting itself, such a judgment clearly would not be deserving of judicial deference. A difficult question would be presented if, even absent any incumbent-protection intent on the part of Congress, campaign finance regulations had the effect of protecting incumbents. Establishing that campaign finance has such an effect, however, ought to require serious empirical analysis, not just armchair theorizing.<sup>333</sup> But even if campaign finance could be shown to have some incumbency-protecting effects, thereby diminishing or eliminating judicial deference to the legislature's judgment, such effects should not *ipso facto* lead to a *court's* conclusion that the legislation is unconstitutional. Campaign finance regulations conceivably could have sufficiently important countervailing benefits vis-à-vis other aspects of Republican Legitimacy.

Determining what if any connection there is between campaign finance and incumbency-protection lies beyond the scope of this Article. What *is* relevant is that the constitutional principle of Republican Legitimacy identifies a crucial issue that was almost entirely absent from the Court's analysis in *Citizens United*.<sup>334</sup> determining whether campaign finance regulations are a form of incumbent-protection is necessary to determining the judicial deference that should be given to the political branches' considered harmonization of the competing constitutional commitments of free speech and Republican Legitimacy.

## V. CONCLUSION (AND PROLOGUE)

First, a brief conclusion. Partisan gerrymandering and burdensome identification requirements that discourage certain populations from voting harm individuals, but they also threaten structural constitutional harms to representative democracy. To date, case law has recognized only the former type of harm -- individual-rights based claims sounding in equal protection and free speech. This Article identified the structural constitutional interest

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<sup>332</sup> See Bradley A. Smith, *Faulty Assumption and Undemocratic Consequences of Campaign Finance Reform*, 105 Yale L. J. 1049, 1072-73 (1996) (arguing that "[c]ontribution limits tend to favor incumbents by making it harder for challenges to raise money and thereby made credible runs for office").

<sup>333</sup> The strongest argument that campaign finance regulations protect incumbents was short on empirics. See Smith, *supra* note 332, at 1072-75.

<sup>334</sup> In some of the cases prior to *Citizens United*, Justices Scalia and Kennedy had explicitly accused campaign finance of being an incumbency-protection ploy. See, e.g., *McConnell*, 540 U.S. at 247 (Scalia, J., dissenting in part); *McConnell*, 540 U.S. at 306 (Kennedy, J., dissenting in part). The more liberal members of the Court have offered up arguments in opposition. See, e.g., *Citizens United*, 130 S.Ct. at 968-970 (Stevens, dissenting). While the majority opinion in *Citizens United* did not explicitly invoke the incumbency-protection accusation, Justice Stevens' dissent did. See *id.*

that also is endangered -- Republican Legitimacy -- and explains why it is important that Republican Legitimacy be recognized as a standalone, structural constitutional principle.

Now to the prologue.<sup>335</sup> While courts have a vital role in implementing Republican Legitimacy -- courts should identify Republican Legitimacy as a constitutional principle, define it, and determine what role they and other governmental institutions properly play in securing Republican Legitimacy -- they are incapable of fully enforcing it on their own. Inherently political considerations appropriately inform many of the rules-of-the-road of representative democracy. Legislatures have better access to the information that properly informs -- and are better institutionally constituted to making the hard tradeoffs among the competing legitimate commitments that invariably lie behind -- most of representative democracy's rules-of-the-road. Further, courts are a poor institutional context for distinguishing between reasonable and unreasonable compromises among legitimate considerations, though they can play an important back-up role in policing (and hopefully thereby deterring) egregious violations.

This means that the political branches themselves must be primarily responsible for protecting Republican Legitimacy. This can be done if legislatures choose representative democracy's rules-of-the-road by means of "tempered" rather than run-of-the-mill "hard-ball" politics. Tempered politics refers to a set of norms that aim to harness politicians' compromise-seeking and deal-making skills, while ensuring that the legislative outcomes constitute reasonable compromises that do not undermine Republican Legitimacy. Tempered politics tempers the ordinary rough-and-tumble of politics in two respects: decisions implicating Republican Legitimacy must be (1) bipartisan, rather than deeply partisan, and (2) commonwealth directed, rather than self-interested or party-interested. In short, tempered politics is the higher-order care we expect when politicians consider constitutional amendments. And this is sensible insofar as the rules-of-the-road of representative democracy implicate constitutional matters.

But how realistic is it to expect that legislators will self-regulate, and act in accordance with the norms of tempered politics? They are the ones, after all, who have harmed Republican Legitimacy in the first place.

Fortunately, there are two reasons why reliance on legislatures is not a "self-defeating proposal" that unrealistically asks the legislatures to overcome the very weaknesses that my proposal aims to remedy.<sup>336</sup> First, there is no reason to presume that legislators won't take seriously their oaths to uphold the Constitution once they understand that it contains the principle of Republican Legitimacy. Second, most harms to Republican

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<sup>335</sup> A companion article addresses the issues that follow. See Rosen, *supra* note 21.

<sup>336</sup> For the concept of self-defeating proposals, see Adrian Vermeule, *Self-Defeating Proposals: Ackerman on Emergency Powers*, 75 FORDHAM L. REV. 631, 636-40 (2006).



Legitimacy have been created by *state* legislatures – the institutions that are presumptively, and primarily, responsible under the Constitution for establishing the rules governing both state and federal elections.<sup>337</sup> Congress faces different incentives that insulate Congress from many of the pressures to which state legislatures are subject. There are several legislative strategies Congress can use to encourage states to act consistently with tempered politics. Their detailed elaboration, however, must await another day.

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<sup>337</sup> See U.S. CONST. ART. I, §4, cl. 1.